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In the

Supreme Court of the United States

October Term, 1997

ANDREW LLOYD WEBBER; REALLY USEFUL GROUP, PLC; REALLY USEFUL COMPANY, INCORPORATED; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INCORPORATED,

Petitioners,

vs.

RAY REPP and K & R MUSIC, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Noting that "there is a split in the circuits on this important issue," 1 Patry, Copyright Law & Practice, 704, this leading copyright authority foresaw the primary issue presented by this petition: where a copyright plaintiff relies on striking similarity as indirect circumstantial evidence of access, "does the plaintiff bear the burden of disproving independent creation as part of its prima facie case, or does the defendant bear the burden of proving independent creation, and if so, when?"

2. Does a copyright plaintiff meet its burden of establishing a prima facie case of copying by: (a) expert evidence of "striking similarity" which does not consider defendants' evidence of independent creation, including evidence of common prior sources; or (b) expert testimony of "striking similarity" where there is "little, if any," evidence that defendant had access to the allegedly infringed work?

3. Is a district court judge precluded from comparing two works to determine that no reasonable juror could find the two works sufficiently similar as to warrant an inference of access?

STATEMENT PURSUANT TO RULE 29.6

Petitioner The Really Useful Group Limited, sued herein as The Really Useful Group, PLC, is owned by Really Useful Holdings Limited. The Really Useful Group Limited has two nonwholly-owned U.K. subsidiaries: The Really Useful Games Company Limited and The Adelphi Theatre Company Limited.

Petitioner The Really Useful Company, Inc. is a U.S. subsidiary of, and wholly owned by, Petitioner The Really Useful Group Limited. The Really Useful Company, Inc. has no nonwholly-owned subsidiaries.

Petitioner MCA Records, Inc. is a wholly-owned subsidiary of Universal Studios, which is owned by Seagram, Ltd. and Matshushita Corporation. MCA Records, Inc. has no nonwholly- owned subsidiaries.

Petitioner Hal Leonard Publishing Corporation has been re-incorporated as Hal Leonard Corporation. Its parent is Hal Leonard Foreign Sales Corporation. It has no nonwholly-owned subsidiaries.

The parent companies of Petitioner Polygram Records, Incorporated are Polygram Holding, Inc., Polygram N.V., and Philips, N.V. Polygram Records, Incorporated has no nonwholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Andrew Lloyd Webber, The Really Useful Group, Ltd., sued herein as The Really Useful Group, PLC, The Really Useful Company, Incorporated, MCA Records, Inc., Hal Leonard Corporation, sued herein as Hal Leonard Publishing Corporation and Polygram Records, Incorporated respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 30, 1997.

OPINIONS BELOW

The opinion of the court of appeals is reported at 132 F.3d 882 (2d Cir. 1997). The opinion of the district court is reported at 858 F. Supp. 1292 (S.D.N.Y. 1994). Other opinions in the case are reported at: 947 F. Supp. 105 (S.D.N.Y. 1996); 914 F. Supp. 80 (S.D.N.Y. 1996); 892 F. Supp. 552 (S.D.N.Y. 1995); and 142 F.R.D. 398 (S.D.N.Y. 1992).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1997. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc with the court of appeals. The petition was denied on February 20, 1998. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(c), provides in pertinent part:

> Motion and Proceedings Thereon. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(e), provides in pertinent part:

> Form of Affidavits; Further Testimony; Defense Required. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit reversed summary judgment entered in U.S. District Court, Southern District of New York, dismissing an action brought by Ray Repp and his music publishing company, K&R Music Inc., complaining, inter alia, that the musical composition entitled "The Phantom of the Opera" (the "Phantom Song") infringes Repp's song entitled "Till You". Named as defendants in the action are Andrew Lloyd Webber, the composer of the "Phantom Song," Really Useful Group, Limited, the copyright owner and music publisher of the "Phantom Song", and various licensees of rights in the "Phantom Song." (A.3)[1]

Summary Of Relevant Facts

Repp is a composer and performer of liturgical folk music. (A.3-4) He wrote and obtained copyright registration of "Till You" in 1978, a song based on passages from the Book of Luke. (A.4) "Till You" was first distributed to the public in 1978 as part of the album "Benedicamus" in the form of cassettes and record albums, and also appeared in printed song books. (A.4)

Lloyd Webber is an internationally renowned composer, whose works include such acclaimed musical theatrical productions as "Joseph and the Amazing Technicolor Dreamcoat," "Jesus Christ Superstar," "Cats," "Evita," "Starlight Express," "Song and Dance," "Aspects of Love," "Sunset Boulevard," and "The Phantom of the Opera." (A.5, 51)

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[1] References to the Appendix to this petition are referred to herein as (A.__).

Lloyd Webber commenced composing the "Phantom Song" in late 1983, and completed the whole of the melody at issue at that time. He composed the song for his future wife, singer Sarah Brightman. The entirety of the song was completed in late 1984. (A.52-54) The "Phantom Song" subsequently became the title song of the dramatico-musical play "The Phantom of the Opera". (A.55)

On June 20, 1993, petitioners moved for summary judgment on the grounds that no genuine issue of material fact existed as to (a) defendants' lack of access to the complaining work "Till You", and (b) defendants' independent creation of the "Phantom Song." Petitioners' motion was supported by Lloyd Webber's declaration describing his creation of the "Phantom Song". (A.50-57) Sarah Brightman, who was present during the creation of the melody at issue, also submitted a declaration confirming his account of the genesis and creation of "Phantom Song." (A.58-60) Neither had ever heard of Ray Repp, or heard "Till You", prior to this litigation. (A.52, 60)

Petitioners also submitted the affidavits and report of an expert musicologist, Dr. Lawrence Ferrara. Professor Ferrara focused on the analogous sections of music in "Till You" and the "Phantom Song" and denominated the two musical phrases at issue as Phrase One and Phrase Two. (A.68) He found that Phrase One of the "Phantom Song" was derived from Lloyd Webber's earlier compositions which long pre-dated "Till You", namely "Benjamin Calypso" and "Pilate's Dream," respectively from Lloyd Webber's "Joseph and The Amazing Technicolor Dreamcoat" and "Jesus Christ Superstar." (A.73-80, 86-89) He also identified various compositions in the public domain, including pieces by Bach and Grieg, containing music similar to that found in Phrase One of the "Phantom Song." (A.90-91) Professor Ferrara also concluded that the similarities between Lloyd Webber's

earlier music and Phrase One of the "Phantom Song" were greater than the similarities between Phrase One of the "Phantom Song" and the analogous musical phrase in "Till You". (A.77-80) Professor Ferrara found that Phrase Two of the "Phantom Song" was derived primarily from Lloyd Webber's "Close Every Door" from "Joseph and the Amazing Technicolor Dreamcoat," which also predated "Till You", and from other pre-1978 works by Lloyd Webber.[2] (A.80-85) Accordingly, Professor Ferrara's findings supported defendant's claim that the music in the "Phantom Song" that was similar to "Till You" had been independently created by Lloyd Webber.

In opposing summary judgment, Repp asserted that he personally ordered a total of 18,000 copies of "Benedicamus" albums and cassettes and 25,000 copies of songbooks containing "Till You", and that, as of 1994, all but a handful had been sold or distributed. (A.4) Repp was unable to

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[2] Defendants asserted a counterclaim in the action claiming that "Till You" infringed Lloyd Webber's earlier work "Close Every Door". Until determination of that counterclaim, plaintiffs' appeal from the summary judgment decision was premature as there had been no final order in the case. The counterclaim was dismissed following a non-jury trial, 947 F. Supp. 105 (S.D.N.Y. 1996), and plaintiffs' appeal followed. In its decision dismissing the counterclaim, the court found that Phrase One of "Till You" and Phrase One of "Close Every Door" share five identical melodic pitches and that Phrase Two of the two songs share seven fundamental melodic pitches in identical consecutive sequence. 947 F. Supp. at 112-13. Defendants cross-appealed the dismissal of the counterclaim. The Second Circuit Court of Appeals affirmed the district court's findings and conclusions. (A.21-22)

document the distribution of these units, including how many were distributed during the relevant access period of 1978 to 1983 and where, because, he claimed, in 1988 he had discarded all financial documents that pre-dated 1985. (A.25 n.2)

Repp claimed to have performed "Till You" in over two hundred concerts given since 1978 in the United States and abroad, (A.25-26), but there was no evidence that any defendant was present at any of these performances. "Till You" was not performed in England, where Lloyd Webber principally resided during the access period. Although the album "Benedicamus" was played on a college radio station, there was no evidence in the record of the times or frequency of radio airplay of "Till You" during the access period. (A.4)

Although Repp sought to posit one Robert Velline as a conduit of his music to Lloyd Webber, Velline first met Lloyd Webber after the "Phantom Song" had been recorded and released to the public. (A.8, 26) In any event, Velline denied ever discussing Repp or Repp's music with either Andrew Lloyd Webber or Lloyd Webber's brother, with whom Velline was first acquainted. (A.26)

Plaintiffs' response to the motion for summary judgment included the affidavits and reports of two musicologists, Professors H. Wiley Hitchcock and James Mack. Professor Hitchcock found "the basic rhythmic character" and the "basic metrical character" of each piece identical. (A.111-12) Although the two pieces were written in different harmonic modes, Professor Hitchcock opined that they "reveal significant correspondences, and in harmonic rhythm an absolute identity." (A.124) Professor Hitchcock also asserted that there were striking similarities between the two melodies. (A.118)

Although he did not submit a separate report, Professor Mack summarily concluded "that 'Till You' and 'Phantom' are strikingly similar, and are so similar as to preclude separate creation." (A.105) Neither Professor Hitchcock nor Mack considered any prior art in reaching these conclusions of striking similarity (A.144-48, 151), and neither one addressed or rebutted either the evidence of independent creation submitted by Lloyd Webber and Ms. Brightman, or Professor Ferrara's analysis of the similarities between the "Phantom Song" and Lloyd Webber's own earlier works and public domain works (A.144-48, 151).

The District Court's Opinion

The district court granted defendants' motion for summary judgment and dismissed the complaint.

The district court determined that plaintiffs had failed to meet their burden of establishing a reasonable possibility that Lloyd Webber had access to Repp's song, "Till You." Specifically, it found that the alleged nexus between Lloyd Webber and Velline did not justify an inference of access (A.39-40); that plaintiffs' evidence of "wide dissemination" did not rise above the level of pure speculation (A.42); and, based upon an aural examination of the two songs and consideration of the expert testimony submitted by both parties, that the similarities in the works were not "strikingly similar" as to support an inference of copying. (A.43-44) The district court found that while there were several notes in common between the two works, "the songs differ in tempo and style." (A.44) It noted that plaintiffs' own expert, Professor Hitchcock, had conceded that "the two pieces differ in harmony, key and mode." (A.44, 123-24)

In addition, the district court ruled that even if plaintiffs had proven access and substantial similarity, they

did not submit any evidence to controvert or rebut the evidence of independent creation contained in the declarations of Lloyd Webber and Ms. Brightman. The district court ruled that plaintiffs' characterizations of the declarations as interested and incredible were insufficient to defeat a motion for summary judgment. (A.46) Although the district court also considered Professor Ferrara's expert analysis that the "Phantom Song" was independently derived from Lloyd Webber's earlier works or public domain works, it did not find the expert evidence, as a matter of law, sufficient to rebut an inference of copying. (A.46 n.15).

The Court of Appeals' Opinion

The court of appeals reversed. It held that "[w]hile there was little, **if any**, evidence demonstrating access, there was considerable evidence that 'Phantom Song' is so strikingly similar to 'Till You' as to preclude the possibility of independent creation and to allow access to be inferred without direct proof." (A.19) (emphasis supplied). The court of appeals criticized the district court for conducting its own aural examination of the works (A.19) and for crediting the unrebutted affidavits of Lloyd Webber and Ms. Brightman attesting to independent creation of the "Phantom Song". (A.20) The court of appeals opined that the district court erroneously "undertook to resolve some material issues of fact . . . rather than to identify those issues and leave them for trial." (A.17-18)

The "considerable evidence" before the court of appeals consisted of plaintiffs' expert affidavits, expert report, and expert interrogatory responses. Although plaintiffs' experts concluded that striking similarity exists between the "Phantom Song" and "Till You", nowhere in any of those materials was any analysis performed of the Lloyd Webber and public domain works pre-dating "Till You" cited by

defendants as supporting independent creation of the "Phantom Song". (A.144-48, 151) Plaintiffs' experts' conclusions as to striking similarity, therefore, were limited to a comparison of "Till You" and the "Phantom Song".

In describing the relationship between the recurrent themes in copyright cases of "striking similarity" and independent creation, the court of appeals regarded independent creation solely as an affirmative defense and disregarded the burden of a copyright plaintiff to disprove evidence of independent creation in establishing a prima facie case of copying through proof of striking similarity.

The court of appeals seemed to recognize the confusion it was creating as to the burden of proof in this crucial area of copyright law:

> The plaintiffs here have established a prima facie case of access through striking similarity, which certainly includes the element of probative similarity. Whether the evidence of independent creation here is sufficient to rebut the prima facie case established in this action is a question for the factfinder, whatever the contours of the burden of establishing the defense.

(A.21)

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUIT COURTS OF APPEAL AND DETERMINE THE CONTOURS OF THE BURDEN OF PROVING "STRIKING SIMILARITY" IN COPYRIGHT CASES

A. The Court Below Has Eliminated Plaintiff's Burden Of Establishing Striking Similarity That Precludes The Possibility Of Independent Creation

To establish copyright infringement, a plaintiff must establish two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991). Accord: Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 548, 105 S. Ct. 2218, 2224 (1985).

Because there is rarely direct evidence of copying, a finding of copying "typically depends on proof of access and probative similarity." 4 Nimmer on Copyright, §13.01B at 13-13. As the court of appeals ruled below, indirect evidence of copying "includ[es] access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony" (A.15), quoting Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992).

The law is clear that where a plaintiff makes out a prima facie case of copying through a showing of access and probative similarity, the burden shifts to defendant to present

evidence of independent creation. Eden Toys, Inc. v. Field & Co., 675 F.2d 498 (2d Cir. 1982); Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977). This, however, is not that case. The court of appeals did not reverse the district court's finding that plaintiffs had failed to establish copying through evidence of wide dissemination and other means of access. Indeed, the court of appeals found that plaintiffs had presented "little, if any" evidence of access. (A.19) Thus, its decision turned on its analysis of plaintiffs' evidence of striking similarity and whether plaintiffs had established a prima facie case of copying through striking similarity. (A.19-21)

In treating independent creation as an affirmative defense, the court of appeals failed to acknowledge the different burdens applicable to a case where copying is established through access and probative similarity and a "striking similarity" case.[3] In the latter instance, every circuit court of appeals that has considered the issue, including the Second Circuit, until its decision below, has imposed upon a plaintiff relying upon striking similarity the affirmative burden -- as part of its prima facie case -- of precluding the possibility of independent creation. Until the decision below, this burden has required plaintiff to consider evidence of prior art or public domain common sources, particularly where such evidence has been proffered by defendant.

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[3] In stating that independent creation was an affirmative defense, the court of appeals relied upon its decision in Eden Toys, supra. Striking similarity was not an issue in Eden Toys. In Novelty Textiles, supra, a case relied upon by the Eden Toys court for its holding that independent creation was a defense, access was admitted and again no striking similarity claim was made.

The rationale for imposing this burden on a copyright plaintiff in a striking similarity case is clear. Where a plaintiff does not have other evidence of access and relies solely on the "striking similarity" of the works in issue, it is eminently fair, reasonable and logical to impose upon a plaintiff a heightened burden of considering and precluding the possibility of independent creation or of a prior common source. As this Court recognized in Feist, two works may be identical in all respects without any infringement where each work was independently created:

> Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.
>
> To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.

499 U.S. at 345-46, 111 S. Ct. at 1287-88.

In misapplying the law to hold that, where a prima facie case of copying is sought to be established through "striking similarity", independent creation is nonetheless a defense, the court of appeals' decision presents a clear conflict with a majority of the circuits that have considered this issue.

For example, in Gaste v. Kaiserman, 863 F.2d 1061, 1068-69 (2d Cir. 1988), the Second Circuit Court of Appeals ruled that striking similarity could support an inference of access, but that a plaintiff "has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of

independent creation," 863 F.2d at 1068. See 1 Patry, Copyright Law & Practice, 601 ("Gaste correctly puts the burden on the plaintiff to establish copying. . .sufficient. . . to preclude a reasonable possibility of independent creation.")

The defendants in Gaste introduced testimony to demonstrate that the similarities between the songs had sources in prior art. Shouldering plaintiff's burden, in Gaste, plaintiff's "expert analyzed these other works [i.e., the prior art] and testified that they were not substantially similar." 863 F.2d at 1069. In significant contrast here, Repp's experts did not address prior art or the specific art raised by defendants -- Lloyd Webber's own works and public domain works that all pre-dated "Till You" -- as supportive of independent creation of the "Phantom Song."

In Towler v. Sayles, 76 F.3d 579, 584 (4th Cir. 1996), the Fourth Circuit affirmed a directed verdict for defendant where plaintiff's proof of "striking similarity" did not meet the "exacting standard" of precluding the possibility of independent creation.

Contrary to the decision below which treated independent creation solely as an affirmative defense (A.16), the Fourth Circuit Court of Appeals has also ruled in the context of a "striking similarity" case, that "independent creation is not an affirmative defense" and that defendants "do not have the burden of persuasion for independent creation." Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988). The Fourth Circuit explained that where a copyright plaintiff establishes a prima facie case, he has satisfied his burden of going forward and shifts the burden of going forward to defendants, who may rebut plaintiff's presumption by evidence of independent creation. "Regardless of these proof schemes," the court of appeals explained, "the burden of persuasion normally

remains on the plaintiff for his claim throughout the trial." Id.

The Fifth Circuit Court of Appeals in Ferguson v. National Broadcasting Co., 584 F.2d 111 (5th Cir. 1978) ruled that plaintiff could establish her prima facie case if she proved the two songs were "so strikingly similar as to preclude the possibility of independent creation." Id. at 113. Defendants, as here, introduced unrebutted expert evidence that the notes at issue had a prior common source in the public domain works of Johann Sebastian Bach. The court of appeals affirmed the grant of summary judgment to defendants stating, "It is not enough to place two works back to back, if both trace their ancestries back to Bach." Id. at 114.

The Sixth Circuit Court of Appeals in Trapani v. CBS Records, Inc., 857 F.2d 1475 (unpublished) full opinion at 1988 U.S. App. LEXIS 12151 (6th Cir. 1988), also ruled that plaintiff's claim of striking similarity may eliminate plaintiff's burden of proving access only where there is no possibility of independent creation. The court of appeals ruled that the application of striking similarity was limited to complex or sophisticated subject matter and did not apply to a musical copyright case involving two tunes with few distinctive features.

In Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984), also a musical copyright case, plaintiff's expert musicologist, as here, failed to address the issue of "prior common source." In granting defendant's motion for judgment notwithstanding the verdict, the Court of Appeals for the Seventh Circuit unequivocally ruled that "the burden of proving 'striking similarity,' which, by definition, includes taking steps to minimize the possibility of common source, is on the plaintiff." 741 F.2d at 905.

More recently in Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169 (7th Cir. 1997), the Seventh Circuit Court of Appeals, confirmed that the burden of eliminating the possibility of independent creation rests with the copyright plaintiff. ("The more a work is both like an already copyrighted work and -- for this is equally important -- unlike anything that is in the public domain, the less likely it is to be an independent creation.")

Finally, in Benson v. The Coca-Cola Company, 795 F.2d 973, 975 n.2 (11th Cir.), rehearing en banc denied, 801 F.2d 404 (11th Cir. 1986), another music copyright case, the Eleventh Circuit, affirming a directed verdict for the defendant, held that the plaintiff "cannot escape the access requirements by arguing 'striking similarity' of the songs in issue." The court ruled that striking similarity only obviates a showing of access when the similarity "precludes the possibilities of coincidence, independent creation or common source . . . . An opinion establishing striking similarity should address the uniqueness or complexity of the protected work as it bears on the likelihood of copying."

Plaintiffs here failed to review or analyze any prior art sources or the uniqueness of "Till You" in their experts' analyses either as part of their prima facie case of copying or in rebuttal to defendants' independent creation evidence.

Plaintiffs also failed to rebut the evidence of independent creation of the "Phantom Song" contained in the declarations of Lloyd Webber and Ms. Brightman. Indeed, the only objections raised by plaintiff to the declarations of Lloyd Webber and Ms. Brightman were that they were interested parties and their testimony lacked credibility. Until now, such bald attacks on credibility that do not address the substance of the testimony of independent creation have been insufficient to defeat summary judgment. Fodor v. Time

Warner, Inc., 1994 U.S. App. LEXIS 4250 (9th Cir. Mar. 2, 1994); Benson v. Coca-Cola, Co., 795 F.2d 973, 975 (11th Cir.), rehearing en banc denied, 801 F.2d 404 (11th Cir. 1986).[4]

The court of appeals criticized the district court for its alternative holding that plaintiffs' failure to controvert these declarations of independent creation also required summary judgment. It stated:

> The district court apparently was of the opinion that some direct evidence was required to contradict their version of the events surrounding the beginnings of "Phantom Song."

(A.20)

Applying the standards of summary judgment, various courts of appeals have granted summary judgment where the substantive testimony of a party as to the independent creation of an allegedly infringing work was unrebutted. Fodor v. Time Warner, Inc., supra; Benson v. Coca-Cola Co., supra.

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[4] In Favia v. Lyons Partnership, 1996 U.S. Dist. LEXIS 5306 (S.D.N.Y. April 16, 1996), a musical copyright case, the district court ruled that because plaintiff offered "no evidence to controvert Lyons's proof of independent creation, summary judgment must follow as a matter of law." Inconsistent with its opinion below, the Second Circuit Court of Appeals affirmed Favia without comment. 112 F.3d 503 (2d Cir. 1997).

The district court properly considered whether "there is sufficient evidence favoring the moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). See also Lujan v. National Wildlife Federation, 497 U.S. 871, 884, 110 S. Ct. 3177, 3186 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986). In reversing summary judgment, the court below has rewritten plaintiffs' burdens in copyright cases.

B. The Court Below Has Eliminated Plaintiff's Burden Of Establishing Evidence Of Access When Striking Similarity Is Claimed

The court of appeals stated that "there was little, **if any**, evidence demonstrating access," (A.19) (emphasis supplied), but nevertheless permitted an inference of access based solely upon the claim of striking similarity. This statement is in conflict with Gaste, which requires that the inference "must be reasonable in light of all the evidence". Gaste at 1068. Notably, in Gaste, there was evidence of access through an intermediary. See also Moore v. Columbia Pictures Corp., 972 F.2d 939, 944 (8th Cir.), rehearing en banc denied, 1992 U.S. App. LEXIS 25741 (8th Cir. Oct. 9, 1992) (jury in Gaste reasonably found that defendant had access to plaintiff's work through intermediary).

Although the Seventh Circuit Court of Appeals has recently adopted the position that striking similarity alone may establish access, Ty, Inc. v. GMA Accessories, Inc., supra, which is also the position of the Sixth Circuit Court of Appeals, Trapani v. CBS, Records, Inc., supra, other Circuit Courts of Appeals have ruled that a copyright plaintiff has the burden of establishing some other evidence of access even where striking similarity has been established.

In Fodor v. Time Warner, Inc., 1994 U.S. App. LEXIS 4250 (9th Cir. Mar. 2, 1994), the Ninth Circuit Court of Appeals, citing this Court's opinion in Feist, ruled that, in the absence of access, even striking similarities between two works must be deemed fortuitous.

In Takeall v. Pepsico, 1993 U.S. App. LEXIS 31911 (4th Cir. Dec. 8, 1993), cert. denied, 512 U.S. 1236, 114 S. Ct. 2742 (1994), the Fourth Circuit rejected plaintiff's reading of Gaste that a showing of striking similarity automatically precludes any further requirement that the plaintiff show a reasonable possibility of access, and observed that the evidence before the court of appeals in Gaste "was in fact sufficient to demonstrate a reasonable possibility of access."

Finally, in Grubb v. KMS Patriots, L.P., 88 F.3d 1, 5-6 (1st Cir. 1996), the First Circuit rejected an argument that a claim that works are identical necessarily eliminates the need for additional proof of access.

In a marked departure from its earlier rulings, Gaste, supra; Lipton v. Nature Co., 71 F.3d 464 (2d Cir. 1995), the court below has now adopted the per se rule expressly rejected by the Fourth Circuit in Takeall, supra, and implicitly rejected by the Ninth Circuit in Fodor and the First Circuit in Grubb. This Court should grant certiorari to resolve the conflict in the circuits and the confusion in the copyright law on this crucial issue of plaintiff's proof of copying.

II

THE COURT BELOW HAS SEVERELY RESTRICTED THE DISTRICT COURT'S DISCRETION TO GRANT SUMMARY JUDGMENT IN COPYRIGHT CASES

The court below ruled that the issue of striking similarity was a genuine issue of material fact, and that the district court could not conclude on the basis of its own "aural examination" and the parties' expert testimony that the two songs were not substantially similar (A.19). However, as the court below also recognized, plaintiff has the "initial burden" of establishing actual copying, either by direct or indirect evidence. The latter includes access, similarities that are probative of copying, and expert testimony. It is only after plaintiff has established actual copying that the issue of substantial similarity between the two works relating to protectible material is even reached. Expert testimony is not permitted on this issue, which must be decided under the lay listener test. (A.15, 15 n.1); Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir.), cert. denied, 484 U.S. 954, 108 S. Ct. 346 (1987).

The court below cited no authority for its broad limitation on the district court's power to evaluate the evidence before it and determine whether there exists sufficient similarity to create a triable issue of fact. The law, as summarized in 3 Nimmer on Copyright §12.10 is emphatically to the contrary:

> [A]--Decisions by the Court as a Matter of Law
>
> * * *

> Because ordinarily both the plaintiff's and defendant's works are attached to, and regarded as, a part of the pleadings, the court may compare the two works and render a judgment for the defendant on the ground that as a matter of law, a trier of fact would not be permitted to find substantial similarity. . . . Thus, judgment may be rendered for the defendant for lack of substantial similarity in a common law copyright action on general demurrer or motion for summary judgment, and in a statutory infringement action upon motion to dismiss, motion for judgment on the pleadings, motion for summary judgment, or motion for directed verdict.

Indeed, the Court of Appeals for the Second Circuit previously has ruled that at the first stage of analysis the court could conduct its own examination and evaluation to determine if similarities existed which were probative of copying. Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992); Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 766 (2d Cir. 1991). See also Wickham v. Knoxville Intern. Energy Exposition, 739 F.2d 1094, 1097 (6th Cir. 1984) ("a court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity").

The decision below unduly constrains the power of a trial court to consider the sufficiency of the evidence presented on a motion for summary judgment and determine whether a genuine issue of material fact has been presented. On a motion for summary judgment, a district court, faced with competing expert affidavits, must be able to listen to the songs and make its own evaluation as to whether the expert

testimony presents a genuine issue of material fact. Otherwise, summary judgment will never be available when experts disagree on the extent of similarity between works in issue.

CONCLUSION

The decision below virtually eliminates a plaintiff's obligation to present evidence of access when a claim of striking similarity is raised, and it relieves a plaintiff of the burden of establishing striking similarity such as to preclude independent creation. The decision below signals a return to the jettisoned rule disfavoring summary judgment in copyright cases enunciated a half century ago in Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). It requires a trial whenever a plaintiff is able to present an expert affidavit that striking similarity exists, regardless of the paucity of other access evidence or the defendant's proof of independent creation.

This Court should grant certiorari to resolve the conflict in the circuit courts as to the proper allocation of the burden of proof of striking similarity and independent creation in copyright cases. This Court should provide guidelines as to the degree of proof required of copyright plaintiffs relying on "striking similarity" to establish a prima facie case of copying, and determine whether a claim of "striking similarity" obviates the need for other evidence of access. In addition, this Court should define the role of the trial

court in evaluating the sufficiency of the evidence on a motion for summary judgment in a copyright case.

Dated: New York, New York
May 20, 1998

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 218, 509 — August Term, 1997
(Argued: October 6, 1997 Decided: December 30, 1997)
Docket Nos. 96-9691, 97-7050

RAY REPP & K & R MUSIC, INC.,

Plaintiffs-Counter-Defendants-Appellants-Cross Appellees,

— v. —

ANDREW LLOYD WEBBER; REALLY USEFUL GROUP, PLC,

Defendants-Counter-Claimants-Appellees-Cross Appellants,

REALLY USEFUL COMPANY, INCORPORATED; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INCORPORATED,

Defendants-Appellees-Cross Appellants.

Before:

KEARSE, MINER and CABRANES, *Circuit Judges.*

Appendix A

Appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Kram, J.) in favor of all defendants in a music copyright infringement action claiming that the "Phantom Song," composed by defendant Lloyd Webber, copies the song "Till You," composed by plaintiff Repp; cross-appeal from a judgment entered in the same action in favor of plaintiffs after a non-jury trial on counterclaims alleging that "Till You" copies the song "Close Every Door," composed by defendant Lloyd Webber.

Judgment subject of appeal reversed; judgment subject of cross-appeal affirmed.

WILLIAM R. COULSON, Cherry & Flynn, Chicago, Ill. (Peter Flynn, Cherry & Flynn, Chicago, Ill., of counsel), *for Plaintiffs-Counter-Defendants-Appellants-Cross-Appellees.*

JANE G. STEVENS, Gold, Farrell & Marks, New York, N.Y. (Christine Lepera, Robert P. Mulvey, Gold, Farrell & Marks, New York, N.Y., of counsel), *for Defendants-Counter-Claimants-Appellees-Cross-Appellants* and *Defendants-Appellees-Cross Appellants.*

MINER, *Circuit Judge:*

Plaintiffs Ray Repp and K & R Music, Inc. ("K & R") appeal from a summary judgment entered in the United States

Appendix A

District Court for the Southern District of New York (Kram, J.) in favor of defendants in an action involving claims and counterclaims grounded in copyright infringement. The defendants are Andrew Lloyd Webber, a well-known British composer of musical works for stage production, Really Useful Group, plc, his copyright proprietor, and Really Useful Company, Incorporated, Polygram Records, Inc., MCA Records, Inc. ("MCA") and Hal Leonard Publishing Corporation, all said to be Lloyd Webber's licensees. The summary judgment dismissed the claim of Repp, an established American composer of popular liturgical music, and K & R, a publisher of religious and church music, that the "Phantom Song," composed by Lloyd Webber, copies the song, "Till You," composed by Repp. Also before us is a cross-appeal from a judgment in favor of Repp and K & R entered in the same action after a non-jury trial. This judgment dismissed the counterclaims of Lloyd Webber and his copyright proprietor alleging that "Till You" copies the song "Close Every Door" composed by Lloyd Webber.

For the reasons that follow, we reverse the summary judgment that is subject of the appeal, and we affirm the judgment entered after trial that is subject of the cross-appeal.

BACKGROUND

I. *Of Ray Repp, His Music and His Claim.*

Repp has been a professional composer and performer of liturgical music for more than thirty years. He has written and published music for eleven albums, encompassing one hundred twenty different musical compositions. Over the years, Repp has performed in the United States, Canada, Europe and Asia, and some of his lyrics have been translated into foreign

languages. His music has been published by his own company, plaintiff K & R, as well as others, including Our Sunday Visitor, FEL Publications, Word Publications and Hope Publications. It also has been published by the Lutheran, Episcopal, Presbyterian and Catholic churches and by the Church of the Brethren. Repp's songs have been included in various hymnals and song books. He has been recognized as a leading author and performer of liturgical folk music.

Repp wrote the song "Till You" in 1978 and registered it with the United States Copyright Office the same year. The song is liturgical in nature, being based on passages from the Book of Luke, commonly known as the "Magnificat." It has been distributed since 1978 as part of the album "Benedicamus" in the form of cassettes and record albums. The song appears in sheet music form in books entitled "Benedicamus" and "Life Songs." Twenty-five thousand copies of the sheet music were said to have been published and distributed.

With respect to albums or cassettes that included "Till You," Repp asserts that he personally ordered a total of eighteen thousand copies and that all but a handful have been sold or distributed. Repp is not fully able to document the sales, but he does have some records, including those relating to sales of fifty albums and fifty cassettes of "Benedicamus" to a distributor in Australia. Although music from "Benedicamus" may have made the "heavy play list" at the Fordham University Radio Station, Repp could not establish the frequency with which "Till You" was played on any radio station. However, Repp has performed the song in over two hundred concerts given since 1978 in the United States and many foreign countries. These performances were given in convention centers, churches, universities and theaters. Repp estimates that over one hundred

thousand people have heard him perform his song "Till You," and he contends that Lloyd Webber, having had access to this music, copied it, intentionally or unintentionally, in writing the "Phantom Song."

II. *Of Andrew Lloyd Webber, His Music, His Defense and His Counterclaims.*

Lloyd Webber is a composer who has achieved outstanding international success. He resides in England, maintains a residence in New York City, and travels widely. He has more than three hundred published compositions to his credit. His work for the theater includes such acclaimed musical shows as "Joseph and the Amazing Technicolor Dreamcoat," "Jesus Christ Superstar," "Cats," "Evita," "Starlight Express," "Song and Dance," "Aspects of Love," "Sunset Boulevard," and "The Phantom of the Opera." Lloyd Webber completed the "Phantom Song" in late 1984, and the piece was recorded in December 1985 by Sarah Brightman and Steve Harley. It was released as a single recording in January 1986 in England. "The Phantom of the Opera," a dramatico-musical show had its premiere in London in 1986. "Phantom Song" is an important part of the work, which was registered in the United States Copyright Office in 1987. The show opened on Broadway in 1988.

"Joseph and the Amazing Technicolor Dreamcoat" (hereinafter, "Joseph") first was presented as a choral work in London in 1968. The song "Close Every Door" was among the first portions of the choral presentation that Lloyd Webber completed. The composition was a centerpiece in every subsequent version of "Joseph," which was based on the Biblical tale of Joseph's sale into slavery by his brothers and subsequent rise to success in Egypt. An expanded version was presented at

the Edinburgh Festival in 1972 and in London in 1973. Following the London run, Lloyd Webber and lyricist Tim Rice further expanded "Joseph" into a full-length musical. In 1989, Lloyd Webber's company, Really Useful Group, acquired by assignment all the rights and interest in the copyright for "Joseph," including "Close Every Door." The assignment thereafter was recorded in the United States Copyright Office.

"Joseph" was recorded as an album by Decca Records and publicly released in 1969. "Close Every Door" was the first single recording released from the album. In 1971, Sceptre Records released the album in the United States, where it was sold in retail stores and appeared on the Billboard Magazine charts of Top LPs for twelve weeks. MCA issued a sound recording of "Joseph," including "Close Every Door," in 1974. Sales of the MCA recording exceeded twenty-three thousand units. Between 1969 and 1978, at least forty thousand copies of the sheet music of the vocal score were sold. Between 1968 and 1978, "Joseph" was widely performed by stock and amateur theater companies and was broadcast on the radio. "Close Every Door" was heard in the United States on religious radio programs, which Lloyd Webber asserts were "directly within Repp's sphere of interest." Lloyd Webber contends that the widespread dissemination of "Close Every Door," together with Repp's interest in the musical genre, provide important evidence of access. He asserts that there are striking and significant similarities demonstrating that "Till You" copies the earlier written "Close Every Door."

Appendix A

III. *Of Defendants' Motion for Summary Judgment.*

A. *The Motion and the Response.*

The defendants' summary judgment motion was made at the conclusion of fact and expert discovery. The moving papers include a declaration by Lloyd Webber that he began to compose "Phantom Song" at Sydmonton Court, his home in Sydmonton, England, in late 1983. Sarah Brightman, who later became his wife, worked with him as he composed. According to Lloyd Webber, the song was designed to show off Brightman's vocal range, and she sang the melody as he composed at the piano. No lyrics were written at that time, and no notation of the music was made. Lloyd Webber declared that, although the song was not completed that day, the whole of the melody was developed. Thereafter, Lloyd Webber was occupied with other projects and did not get around to completing the entire "Phantom Song" until 1984.

Ms. Brightman furnished a declaration confirming Lloyd Webber's account of the origination of "Phantom Song." In her declaration, she recalled Lloyd Webber asking her to sing the music that he played on the piano. Lloyd Webber modified the melody and the chords of the piece as he played and she sang. Brightman declared that in September 1984 she accompanied Lloyd Webber to a meeting with Michael Batt, who was to produce a recording of the song Lloyd Webber had composed for her. In October 1984, Brightman and Batt recorded "Phantom Song" at Air Studios in London.

Both Lloyd Webber and Brightman assert that they never heard of Ray Repp or his music prior to this litigation. Lloyd Webber testified at his deposition that he dislikes "pop church

music" and never listens to it. His interest in "church music" is limited to "the English Choral tradition." Although Repp alleged a connection with Lloyd Webber through a common acquaintance, Robert Velline, it appears that Velline actually was acquainted with Lloyd Webber's brother and met Lloyd Webber only briefly in 1986. Velline, a 1960s rock singer known as Bobby Vee, had received a copy of Repp's album, "Benedicamus," in 1979.

Lloyd Webber also submitted in support of his motion for summary judgment the affidavits and report of an expert musicologist, Dr. Lawrence Ferrara. Ferrara is a Professor of Music at New York University and has written numerous books and articles on musical analysis. In analyzing the part of "Till You" allegedly infringed by the "Phantom Song," he identified two separate musical phrases in "Till You," and three separate phrases in the "Phantom Song." Ferrara determined that the third phrase really was a variant of the first phrase in the latter piece. In arriving at his findings, he reviewed Lloyd Webber's prior works as well as other extant musical literature.

Ferrara found that the first phrase of the "Phantom Song" was derived from Lloyd Webber's earlier compositions: "Benjamin Calypso" and "Pilate's Dream." He also identified in phrase one various compositions in the public domain, including pieces by Bach and Grieg. He found that phrase two of the "Phantom Song" was derived primarily from "Close Every Door" but also from other works by Lloyd Webber. Professor Ferrara was of the opinion that there is a greater similarity between phrase two of "Close Every Door" and phrase two of "Till You" than there is between phrase two of "Phantom Song" and phrase two of "Till You." Defendants put forth Ferrara's findings that the two relevant phrases of the "Phantom

Song" were derived from compositions by Lloyd Webber that predated "Till You," and his findings that the melody in phrase one was derived from compositions in the public domain, to support their claim that any music in the "Phantom Song" similar to "Till You" results from Lloyd Webber's independent creation.

Plaintiffs' response to the motion for summary judgment included the affidavits and reports of two musicologists — Professors H. Wiley Hitchcock and James Mack. Professor Hitchcock is Distinguished Professor of Music at the City University of New York and Founding Director of the Institute for Studies in American Music at Brooklyn College of City University. He is the author of a number of scholarly books and articles about music. Hitchcock provided a thirty-five page musicological analysis, with attached charts, to support his conclusion that "Phantom Song" is based on "Till You." In his analysis, he examined overall structure, rhythm and meter, melody and harmony and the interaction of these elements in the two pieces as a whole. Hitchcock found "the basic rhythmic character" and the "basic metrical character" of each piece identical. Although the two pieces are written in different harmonic modes, Hitchcock opined that they "reveal significant correspondences, and in harmonic rhythm an absolute identity."

According to Professor Hitchcock, the principal and most important aspect to be considered in the comparison of the two pieces is the melody of each piece. Analyzing pitch and rhythm as the constituent elements of melody, Hitchcock asserted that "there were striking similarities between the two melodies." His conclusion was as follows:

> Between "Till You" and "Phantom Song," however, the similarities are so many, in so many areas, over

> such an extraordinary proportion of the compositions, that I cannot consider them as insignificant or coincidental, and I must conclude that "Phantom Song" is based on "Till You."

Professor Mack is Professor and Chairman of the Humanities Department at Harold Washington College in Chicago, Illinois. He has composed music and has been employed as an arranger, conductor and record producer. He also has been involved in the production of radio and television commercials. Professor Mack has conducted various symphony orchestras in the performance of his own works and has performed as a flautist on a number of occasions. His analyses are put forth in his affidavit and in Repp's answer to certain interrogatories. Mack approached the music in question from a contemporary commercial point of view as well as from the traditional academic perspective utilized by Professor Hitchcock.

Although he was largely in agreement with Professor Hitchcock's analysis and conclusions, Professor Mack found "even more similarities," particularly "harmonic similarities" than were found by Hitchcock. Mack's analysis also took into account his opinion that aural impressions are more significant in commercial music than in symphonic music because the former is designed for the lay listener who derives his impression from what he or she hears. Professor Mack concluded "that 'Till You' and 'Phantom' are strikingly similar, and are so similar as to preclude separate creation."

B. *The Opinion of the District Court*

In its comprehensive decision granting summary judgment dismissing the claims of plaintiffs, the district court first agreed

with defendants' contention "that plaintiffs cannot prove that Lloyd Webber had access to Repp's 'Till You' song prior to composing the Phantom Song." *Repp v. Lloyd Webber*, 858 F. Supp. 1292, 1301 (S.D.N.Y. 1994)("*Repp I*"). The district court determined that there was no chain of events by which Lloyd Webber might have gained access to Repp's song, since Lloyd Webber categorically denied any exposure to Repp or his music and there was no nexus between Robert Velline and Lloyd Webber that would justify an inference of access on that basis. *See id.* at 1301.

The district court also determined that the wide dissemination of the allegedly infringed work, which could satisfy the burden of showing access, was not established. In arriving at this conclusion, the district court pointed to various perceived deficiencies in the plaintiffs' evidence — the lack of documentary proof of the number of copies of "Till You" actually distributed to the public in album, tape or cassette form; the failure of the testimony to describe quantity, time and place of distribution of the "Benedicamus" album; inability to establish that the advertising of Repp's music included "Till You" as a distinct composition; and, despite Lloyd Webber's fondness for church music and the widespread performance of Repp's music in church and other venues, the failure to establish that Lloyd Webber visited any of the places where "Till You" was performed. *See id.* at 1301-03.

The district court also rejected plaintiffs' contention that "Till You" is so strikingly similar to the "Phantom Song" as to preclude the possibility of independent creation and to permit access to be inferred without direct proof. In this connection, the district court stated:

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> Upon aural examination of the two songs and consideration of the expert testimony submitted by both parties, the Court finds that any similarities that exist between the two works are not so extensive as to support an inference of copying and improper appropriation without more. While the two melodies share several common notes, the songs differ in tempo and style. In addition, plaintiffs' expert, Prof. Hitchcock, concedes that the two pieces differ in harmony, key and mode. Under the circumstances, the Court finds that the two songs do not share a striking similarity sufficient to justify a finding of copying in the absence of access to the copyrighted work.

Id. at 1303.

The district court also accepted the defense of independent creation. The court credited the declarations of Lloyd Webber and Brightman concerning the creation of the "Phantom Song" at Lloyd Webber's home in Sydmonton in 1983 and the later development of the song in 1984. According to the district court, "[p]laintiffs have not submitted any evidence to contradict defendants' proof that the Phantom Song was created in the manner" described in the declarations of Lloyd Webber and Brightman. *Id.* at 1304. The court rejected plaintiffs' argument "that Lloyd Webber and Brightman are interested parties, and that their allegations of independent creation are therefore incredible." *Id.* Finally, the court dismissed pendent state claims of unfair competition and deceptive trade practices for lack of jurisdiction, finding, among other things, that there was not complete diversity of citizenship. *See id.* Plaintiffs do not here contest the dismissal of the state claims.

Appendix A

IV. *Of the Trial of the Counterclaims and the Decision that Followed.*

In denying a motion to dismiss the counterclaims, the district court determined "that a reasonable jury could infer that Repp had access to the song 'Close Every Door' by virtue of its wide dissemination in the public domain" prior to the composition of 'Till You.' In addition the Court found that an issue of fact existed as to whether the two works were substantially similar. *See Repp v. Lloyd Webber*, 892 F. Supp. 552, 557-58 (S.D.N.Y. 1995). Accordingly, Lloyd Webber having withdrawn his claim for damages, the parties proceeded to trial before the court.

Lloyd Webber testified that he had not heard "Till You" in any form until after he filed the counterclaim, which was interposed in reliance upon the analysis of Professor Ferrara. According to the testimony of Ferrara, there were twelve fundamental melodic pitches in common in the analogous measures of "Till You" and "Close Every Door." Nine of the twelve were said to appear in identical consecutive sequence. Ferrara opined that section A of both pieces shared the same internal structure and that there were other similarities between the two songs, including harmonic similarities. Each song was said to consist of two sections of music, alternatively repeated: section A, containing the similar music at issue and section B, containing dissimilar music. It was Ferrara's opinion that the music included in section A of each song comprised more than fifty percent of the published songs.

Repp testified that he did not copy "Close Every Door" when he wrote "Till You," and that the two pieces did not at all sound alike to his ear. He testified that he first attended a live stage performance of "Joseph and the Amazing Technicolor

Dreamcoat" in 1982. It is at that time that he would have heard "Close Every Door" for the first time, although there was evidence that Repp had been aware of the existence of Lloyd Webber's work, including "Joseph," prior to that time. Testifying on behalf of Repp at the trial, Professor Mack concluded that "Till You" and "Close Every Door" were "distinctly dissimilar." He noted differences in the thrust and ambience of each song, observing that the songs are set to different meters, one is in the major mode and one in the minor, and that the rhythms are "antithetical." In arriving at his conclusion, Mack analyzed the components of harmony, melody and mode, as well as meter and rhythm. According to Mack, Repp did not copy from "Close Every Door."

In dismissing the counterclaims following trial, the district court set forth at length its findings of fact and conclusions of law. *See Repp v. Lloyd Webber*, 947 F. Supp. 105, 107 (S.D.N.Y. 1996)("*Repp II*"). In the opinion, the district court rejected Lloyd Webber's claims regarding Repp's access to "Close Every Door." The court accepted Repp's testimony that he was not exposed to the piece until he attended a performance of "Joseph" in 1982. *See id.* at 114-115. With respect to the widespread dissemination of the piece as a basis for access, the district court noted, among other things, that "Joseph" did not achieve its greatest commercial success until after 1980, two years after "Till You" was created. *See id.* at 115. The court also noted that the evidence of sales and distribution prior to that time was too sparse to support an inference of access. *See id.* On the question of substantial similarity, the district court stated that it "credits the testimony and conclusions of Repp's music expert, James Mack ('Mack'), and finds that Lloyd Webber has not established that Repp copied from 'Close Every Door.' " *Id.* In crediting Mack's testimony, the district court in its opinion undertook a

detailed examination of the Mack musicological analysis and identified the deficiencies in Lloyd Webber's evidence.

DISCUSSION

I. *Summary Judgment Reversed.*

Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139 (2d Cir. 1992). Actual copying must first be shown, either by direct evidence or by indirect evidence. *See id.* at 140. The latter type of evidence "includ[es] access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony." *Id.* It is only after actual copying is established that one claiming infringement is required to show substantial similarity[1] between the two works relating to the protectible material. *Id.* In satisfaction of this requirement in a case alleging music plagiarism, the claimant is constrained to prove that "defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff." *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

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1. Copyright caselaw has caused considerable confusion by the use of the term "substantial similarity" at two different points of the copyright infringement analysis. In an effort to clarify this confusion, we have noted that the term "probative similarity" should be used when referring to the initial burden of proving copying by establishing access and/or similarities. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992). After a plaintiff has proved copying, he must then show that the copying was unlawful by establishing "substantial similarity" between the works at issue. *See id.* at 140-41.

We have held that where there are striking similarities probative of copying, proof of access may be inferred: "If the two works are so strikingly similar as to preclude the possibility of independent creation, copying may be proved without a showing of access." *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) (quotation and citation omitted); *see also Gaste v. Kaiserman*, 863 F.2d 1061, 1067-68 (2d Cir. 1988). Independent creation is an affirmative defense, evidence of which may be introduced to rebut a prima facie case of infringement. *See Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 501 (2d Cir. 1982). The fact that infringement is "subconscious" or "innocent" does not affect liability, although it may have some bearing on remedies. *ABCKO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998-99 & n.12 (2d Cir. 1983).

We review the granting of a motion for summary judgment by applying the same standard as the district court applied and determine *de novo* whether or not summary judgment is warranted. *See Taggert v. Time Inc.*, 924 F.2d 43, 45-46 (2d Cir. 1991). Under the governing Rule, judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Rule is clear in "provid[ing] that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

In our review of the district court's decision, it is necessary for us to resolve all ambiguities and draw all inferences in favor

of the non-moving party. *See Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In making the necessary showing, "[c]onclusory allegations will not suffice to create a genuine issue." *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990). The Supreme Court teaches that a "genuine" dispute over a material fact arises only where it can be said that the evidence would allow a reasonable jury to find in favor of the non-moving party. *Liberty Lobby*, 477 U.S. at 248.

We are mindful that factual materiality is governed by reference to the applicable substantive law. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988). In this case, of course, our reference is to the substantive law governing actions for copyright infringement. Because the non-moving parties, here the plaintiffs, bear the burden of proof at trial on their claim that Lloyd Webber's "Phantom Song" copies Repp's "Till You," the defendants may satisfy their burden under Rule 56 by showing "that there is an absence of evidence to support [an essential element] of the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Clearly, the duty of a court on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved by trial and not to decide factual issues. In this regard, the court's task is issue identification, not issue resolution. *See Liberty Lobby*, 477 U.S. at 249. In performing this task, we must assume the truth of the non-movant's evidence. *See id.* at 255. It seems to us that the district court failed to make the requisite assumption. We think that the

district court undertook to resolve some material issues of fact revealed on the motion for summary judgment rather than to identify those issues and leave them for trial. We think that the defendants failed to demonstrate the absence of evidence supporting the elements of plaintiffs' copyright infringement case. And we think that the evidence presented by plaintiffs would allow a reasonable fact-finder to find in favor of the plaintiffs.

In determining that plaintiffs could not prove that Lloyd Webber had access to "Till You" prior to composing "Phantom Song," the district court first rejected the argument that access could have been gained through an intermediary, Robert Velline. The court noted the uncertainty of Velline's testimony and his ultimate disclaimer of any allegation that he distributed Repp's music to either Lloyd Webber or Lloyd Webber's brother. The court next rejected the claim of access through wide distribution of "Till You," "find[ing] that plaintiffs' evidence of 'wide dissemination' does not rise above the level of pure speculation." *Repp I*, 858 F. Supp. at 1302. As to the argument that Repp's music was widely advertised, the court made a "find[ing] that the fact that K & R may have distributed newspapers and mailings advertising Repp's music does not establish that the 'Till You' song was advertised as a distinct musical composition." *Id.*

Finally, in determining the issue of access, the district court evaluated the evidence of the advertisement and performance of "Till You" in a "specialized religious market." *Id.* This evaluation lead to a "find[ing] . . . that the mere fact that Lloyd Webber composes liturgical works and is 'fond of church music,' . . . does not establish either that he visited any of the places at which Repp's 'Till You' song was performed, or had access to

the *Benedicamus* recording during the relevant time period." *Id.* at 1303.

While there was little, if any, evidence demonstrating access, there was considerable evidence that "Phantom Song" is so strikingly similar to "Till You" as to preclude the possibility of independent creation and to allow access to be inferred without direct proof. The district court recognized our rule permitting an inference of access where there is "striking similarity," citing *Arnstein v. Porter*, 154 F.2d at 468-69 and *Gaste v. Kaiserman*, 863 F.2d at 1067. *See Repp I*, 858 F. Supp. at 1303. However, the district court fell into error in rejecting the evidence presented by the plaintiffs and making findings on this issue. Two highly qualified experts, Professors Hitchcock and Mack, gave unequivocal opinions based on musicological analyses. Professor Hitchcock averred that there was "no doubt about the striking similarity" and concluded that "Phantom Song" is based on "Till You." Professor Mack opined that the two pieces "are strikingly similar, and are so similar as to preclude separate creation."

In the face of the plaintiffs' expert testimony, the district court, relying upon its own "aural examination" as well as the expert testimony put forth by the defendants, *found* "that the two songs do not share a striking similarity sufficient to justify a finding of copying in the absence of access to the copyrighted work." *Repp I*, 858 F. Supp. at 1303. It was not for the district court to make this factual finding where such strong competing evidence was before it. The issue of "striking similarity," by virtue of the supported opinions of the experts, including that of Professor Ferrara for the defendants, was shown to be a genuine issue of material fact. Access to the music of Repp being an essential element of his case, it cannot be said that

there is an absence of evidence to support proof of that element through the inference generated by the striking similarity of the two pieces.

Finally, the district court found on the motion for summary judgment that even if plaintiffs could prove access and probative similarity, "they have not submitted any evidence to controvert the defendants' proof of independent creation." *Id.* at 1303. In arriving at this conclusion, the district court accepted the declarations of Lloyd Webber and Brightman concerning the creation of "Phantom Song" by Lloyd Webber, with the assistance of Brightman, at Lloyd Webber's home in Sydmonton, England. The district court apparently was of the opinion that some direct evidence was required to contradict their version of the events surrounding the beginnings of "Phantom Song."

Plaintiffs note in their brief that a leading text on copyright includes this comment: "Proof of independent creation, whether direct or inferential, should be taken with a grain of salt." 2 Paul Goldstein, Copyright: Principles, Law and Practice § 7.2.2 (1989). Defendants respond that "Professor Goldstein's comment has nothing to do with objective empirical expert evidence of independent creation, which was the heart of defendants' motion." While the comment may well overstate the proposition, the fact remains that the district court accepted only the version of interested witnesses on the question of separate creation. *See Repp I*, 858 F. Supp. at 1303 & n.15. But Professor Mack for the plaintiffs specifically found that the two pieces of music "are so similar as to preclude separate creation." Here, again, the district court erred by undertaking the resolution of a disputed issue of material fact. We have previously determined that independent creation is an affirmative defense and may be used to rebut a prima facie case of infringement. *See Eden Toys,*

Inc. 675 F.2d at 501. The plaintiffs here have established a prima facie case of access through striking similarity, which certainly includes the element of probative similarity. Whether the evidence of independent creation here is sufficient to rebut the prima facie case established in this action is a question for the factfinder, whatever the contours of the burden of establishing the defense. *See generally* 3 Melville B. Nimmer & David Nimmer, Nimmer On Copyright § 12.11[D] (1997).

II. *Judgment After Trial Affirmed.*

We review a trial court's findings of fact following a bench trial for clear error. *See* Fed. R. Civ. P. 52(a); *Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 481 (2d Cir. 1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). Moreover, "special deference" is paid to findings of fact where the trial court bases its determinations on assessments of witnesses' credibility. *See id.* at 574; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 634 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1083 (1997). We may "reverse only when we are left with the firm conviction that a mistake has been committed." *See SNC S.L.B. v. M/V Newark Bay*, 111 F.3d 243, 247 (2d Cir. 1997) (quotation and citations omitted).

In dismissing the counterclaims interposed by Lloyd Webber following a 5-day trial, the district court made detailed findings of fact, carefully evaluating all the evidence presented. The court then undertook a pellucid examination of the

applicable law, which it then applied to the facts as found. We find no error, let alone clear error, in the conduct of the trial or in the findings of the court and therefore have no difficulty affirming substantially for the reasons stated in the district court's well-stated and well-reasoned opinion. *See Repp II*, 947 F. Supp. at 109.

We note that in rejecting Lloyd Webber's claim regarding Repp's access to "Close Every Door," the district court as factfinder accepted Repp's trial testimony that he had no access to this piece of music until he had attended a performance in which it was played in 1982. This was long after the creation of "Till You." The court also found after trial that "Joseph" did not achieve commercial success until after 1980, also after "Till You" was created, and that there was not enough in the way of sales or distribution prior to that time to support a finding of access through that means. Finally, the court accepted the trial testimony of Professor Mack, the only expert witness presented by plaintiffs at trial, that "Till You" was not copied from "Close Every Door." The trial court had the opportunity to evaluate the credibility of witnesses and to review the documentary evidence first-hand, and was persuaded that there was no copying. We have absolutely no basis upon which to reject that determination.

CONCLUSION

In accordance with the foregoing, we reverse the summary judgment entered by the district court dismissing plaintiffs' claims for copyright infringement and remand for further proceedings thereon; we affirm the judgment dismissing defendants' counterclaims for copyright infringement entered after trial by the district court.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 3, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0906 (SWK)

APPEARANCES:

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SHIRLEY WOHL KRAM, U.S.D.J.

In this copyright infringement action, plaintiffs allege that a musical composition authored by Andrew Lloyd Webber ("Lloyd Webber") entitled "The Phantom of the Opera" (the "Phantom Song") infringes plaintiff Ray Repp's ("Repp") song

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"Till You." Presently before the Court is defendants' motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the defendants' motion is granted.

BACKGROUND[1]

I. The "Till You" Song

Plaintiff Repp is a professional musician primarily engaged in composing, publishing, recording and performing popular liturgical music. He has published 11 albums of music, encompassing 120 different musical compositions, and has performed his music in the United States, Europe and Asia.

In September 1978, Repp recorded a working tape of a folk song entitled "Till You," basing the lyrics on certain Biblical verses from the Book of Luke. "Till You" was copyrighted in July 1978. That year, Our Sunday Visitor, Inc. ("OSV"), a Catholic publisher, released Repp's recording of the album *Benedicamus*, including the song "Till You." The *Benedicamus* recording was advertised in OSV's weekly newspaper, which was handed out after services in United States catholic churches across the United States. The *Benedicamus* album also was released in 1978 at three religious conventions: (1) the Los Angeles Religious Education Congress, attended by

1. The following facts are taken from the complaint, the parties' Rule 3(g) Statements, the Declaration of Andrew Lloyd Webber in Support of Summary Judgment, executed on June 17, 1993 (the "Webber Dec."), the Declaration of Sarah Brightman In Support of Summary Judgment, executed on June 17, 1993 and the Declaration of Ray Repp in Response to Defendants' Motion for Summary Judgment, executed on September 14, 1993 (the "Repp Dec.").

approximately 20,000 people; (2) the National Catholic Educators' Convention in St. Louis, attended by more than 20,000 people; and (3) the National Pastor Musicians' Convention in Scranton, Pennsylvania, attended by more than 2,000 people.

In the summer of 1978, Repp started the company K&R Music, Inc. ("K&R"), which re-released the *Benedicamus* album in December 1978. Repp alleges that he personally ordered the manufacture of 5,000 copies of the *Benedicamus* album and more than 8,000 cassette tapes of the *Benedicamus* recording. According to Repp, only a handful of these albums remain, and all of the cassette tapes were either sold or distributed as promotional or airplay copies.[2] Two of Repp's former employees also testified at their depositions that Repp sold "thousands" of *Benedicamus* recordings in the late 1970s and early 1980s. In addition, 100 copies of the sound recording were shipped to an Australian distributor in 1981.

The sheet music of "Till You" has been sold in four books — two renditions entitled *Benedicamus*, and two versions entitled *Life Songs*. Repp alleges that he personally ordered a total of 13,000 copies of *Life Songs* and 12,000 copies of *Benedicamus*. According to Repp, with the exception of a few dozen copies of one version of *Life Songs* and one version of *Benedicamus*, all copies have been sold or distributed as promotional or review copies.

Repp alleges further that he has performed "Till You" at over 200 concerts before at least 100,000 people throughout

2. Repp has no documentary evidence of the number of copies of the *Benedicamus* recording actually sold to the public during the late 1970s and early 1980s, however, as he contends that, in 1988, he discarded all financial documents dated prior to 1985.

the United States, Canada, Japan and Korea, at convention centers, churches, universities and theaters. In addition, he alleges that the album *Benedicamus* has been frequently broadcast on the radio, making the "heavy play list" compiled by Fordham University's campus radio station in New York. In total, Repp alleges that the distribution and exploitation of "Till You" has produced at least $250,000 in revenues.

In order to advertise Repp's music, K&R distributed a tabloid newspaper to more than 300,000 people between 1978 and 1985, including public libraries. K&R also sent out mailings to retail stores and sold Repp's music directly to these stores. According to Repp, many of these stores also sell Lloyd Webber's music and recordings. Additionally, in 1979, Robert Velline ("Velline"), otherwise known as Bobby Vee, a mutual friend of Repp and Lloyd Webber's brother, Julian Lloyd Webber, was given a handmade cassette of some of Repp's works .[3]

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3. Velline testified at his deposition that he did not meet Julian Lloyd Webber until October 1985, and met Andrew Lloyd Webber on one occasion a year after *The Phantom of the Opera* premiered in London. *See* Deposition of Robert Velline, taken on November 4, 1992 ("Velline Dep."), annexed to the Reply Affidavit of Jane G. Stevens, sworn to on November 4, 1993, as Exh. "H," at 55, 65. Plaintiffs dispute this date, pointing to deposition testimony that Velline met the Lloyd Webbers in the early 1980s. *See* Velline Dep., annexed to Plaintiffs' Exhibits to Their Response to Defendants' Motion for Summary Judgment ("Plaintiffs' Exhibits") as "P26," at 159-160. In any event, Velline does not recall whether the handmade cassette tape of Repp's music contained the "Till You" song. Velline also indicated that he had never discussed Repp's music with either of the Lloyd Webbers, or given either of them a copy of Repp's music. *Id.* at 68-69.

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II. The Phantom Song

Defendant Lloyd Webber, a British citizen who maintains a residence in New York City, is the composer of numerous dramatico-musical works, including *Joseph and the Amazing Technicolor Dreamcoat, Jesus Christ Superstar, Cats, Evita, Starlight Express, Song and Dance, Aspects of Love, Sunset Boulevard* and *The Phantom of the Opera*. Lloyd Webber has also composed liturgical music, including musical works entitled "Requiem," "Ubi Caritas et Amor Deus," and "Benedicite."[4] From 1969 to 1975, Lloyd Webber composed and copyrighted, *inter alia*, two songs entitled "Benjamin Calypso" and "Close Every Door," composed for the musical *Joseph and the Amazing Technicolor Dreamcoat*, and two songs entitled "Pilate's Dream" and "'Heaven on Their Minds," composed for the musical *Jesus Christ Superstar*.

In late 1983, Lloyd Webber created the Phantom Song at his home in Sydmonton, England. According to Lloyd Webber, the Phantom Song was conceived to showcase the vocal talents of Sarah Brightman ("Brightman"), an actress and singer.[5] Brightman worked with Lloyd Webber in composing the song, singing notes and musical phrases to assist Lloyd Webber in

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4. Lloyd Webber testified at his deposition that he "is very fond of church music," and "had an opportunity to listen to a great amount of church music . . . around the time of [his] composition of a requiem." *See* Deposition of Andrew Lloyd Webber, taken on November 9, 1992 (the "Webber Dep."), annexed to Plaintiffs' Exhibits as Exh. "P24," at 67-68, 259. Lloyd Webber's father also was a composer of liturgical music.

5. Both Lloyd Webber and Brightman allege that they had never heard of Repp or his music prior to this litigation.

arriving at the Phantom melody. In February or March 1984, Lloyd Webber provided a tape containing unpublished works in progress, including the melody for the Phantom Song, to Trevor Nunn, an English director.

In the summer of 1984, Lloyd Webber viewed Ken Hill's ("Hill") production, *The Phantom of the Opera*, a musical farce incorporating arias from mainstream operatic works. After attending the production, Lloyd Webber entered into discussions with Hill about producing the show for small theatres.

Lloyd Webber considered incorporating the Phantom melody into the Hill project. Accordingly, in late September 1984, Lloyd Webber delivered a tape containing the principal melody of the Phantom song to Michael Batt ("Batt"), an English lyricist. In October 1984, Brightman and Batt made a demonstration recording of the Phantom Song at Air Studios in London. That version of the song was never released, however, and Lloyd Webber decided not to become involved with the Hill production.

In July 1985, Lloyd Webber premiered an abbreviated first act of a musical play based on the book *The Phantom of the Opera*, during which the Phantom Song was performed, at a private musical festival at his Sydmonton residence. In August 1985, while vacationing in Australia with Brightman, Lloyd Webber created an outline for the second act of the musical play.

Brightman recorded the Phantom Song with Steve Harley in December 1985, a single of which was released in January 1986. The ultimate production of *The Phantom of the Opera* premiered in London in 1986, and in New York in 1988. The

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Phantom Song was registered with the United States Copyright Office in 1987.

III. The Complaint

In July 1990, plaintiffs commenced this action in the United States District Court for the Northern District of Illinois for copyright infringement under federal law (Count One) and unfair competition and deceptive trade practices under Ill. Rev. Stats. ch. 121-1/2, §§ 261-272, and 311-317 (Count Two).[6] Specifically, plaintiffs allege that Lloyd Webber copied Repp's "Till You" song in its Phantom melody. The various corporate defendants are alleged to have distributed and exploited the Phantom Song.

In October 1991, the defendants amended their answers, interposing counterclaims against the plaintiffs alleging, *inter alia*, that Repp's 'Till You" song infringes Lloyd Webber's copyright in "Close Every Door." By Order dated October 30, 1991, the Court bifurcated the action, ordering that all issues of liability be tried separately from issues of damages.

The defendants now move for summary judgment, pursuant to Federal Rule of Civil Procedure 56. According to the defendants, the complaint must fail as a matter of law, as the plaintiffs cannot rebut the defendants' evidence that Lloyd Webber independently created the Phantom song.

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6. The action was transferred to this Court in April 1991.

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IV. Expert Witness Analyses

A. Professor Ferrara's Report

In support of their motion for summary judgment, the defendants have submitted two affidavits of Lawrence Ferrara, professor of music at New York University, who concludes that the Phantom Song is directly traceable to prior Lloyd Webber works and existing public domain musical compositions. *See* the Affidavit of Lawrence Ferrara In Support of Defendants' Motion for Summary Judgment, sworn to on June 17, 1993 ("Ferrara Aff."), and the Reply Affidavit of Lawrence Ferrara, sworn to on November 2, 1993 ("Ferrara Supp. Aff."). According to the defendants, this evidence demonstrates that Lloyd Webber independently created the Phantom Song.

1. Musical Similarities Between the Phantom Song and Prior Lloyd Webber Songs

First, Prof. Ferrara contends that phrase one of the Phantom Song (measures 10 through 13 and repeats thereof) has eight melody notes and ten harmonic tones in common with measures 15 through 18 of Lloyd Webber's "Benjamin Calypso" song and measures 17 through 22 of Lloyd Webber's "Pilate's Dream" work.[7] In addition, measures 10 and 12 of the Phantom Song,

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7. The three primary musical elements of a composition consist of melody, harmony and rhythm, which flow through spans of time, called "measures." Melody is the vocal part of a song, comprised of a number of musical notes each of which is separated by specific intervals. The rhythm of a song is determined by the time value of notes and silences, as well as accentuation, grouping of notes and contour. The harmony of a song is the relationship of tones, *i.e.*, the

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15 and 17 of "Benjamin Calypso" and 17 and 20 of "Pilate's Dream" all contain an interval of a perfect fourth.[8] Furthermore, three out of four melody notes are identical between phrase two of the Phantom Song (measures 18 through 22 and repeats thereof), measures 17 and 18 of "Benjamin Calypso" and measures 20 and 22 of "Pilate's Dream."

Second, Prof. Ferrara contends that there are similarities between the Phantom Song and Lloyd Webber's "Close Every Door" and "Heaven On Their Minds" songs. Specifically, there are five consecutive notes identical in pitch content between measures 18 and 19 of the Phantom Song and measures nine through ten of "Close Every Door." The harmony accompanying these five notes is identical. In addition, there are five melody notes in measures two and three of the coda of "Heaven On Their Minds" that are common in pitch content to measures 18 and 19 of the Phantom Song. The harmony accompanying these five notes is also identical.

Finally, Prof. Ferrara notes that Webber uses an interval of a "perfect fourth" as his signature in several of his melodies. Specifically, Prof. Ferrara demonstrates that an ascending then descending perfect-fourth melodic interval is located in each of

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(Cont'd)
essence of how one chord (consisting of three or more notes sounded simultaneously) relates to the next, and how the chords progress from the first chord in a phrase of music to the last. *See* Ferrara Aff. at ¶¶ 12, 13.

8. Unlike the Phantom Song, however, the first three melody notes of measures one and three of 'Till You" move up and down an interval of a minor sixth.

the following Webber songs:[9] (1) measures five and six of the "Song Of The King," copyrighted in 1975; (2) measures four and five of "And The Money Kept Rolling In (And Out)," copyrighted in 1977; (3) measure 48 of "Don't Cry For Me Argentina," copyrighted in 1977; (4) measure five of "Gus: The Theatre Cat," copyrighted in 1981; (5) measures 19 and 20 of "Memory," copyrighted in 1981; (6) measures 52 through 53 of "Overture," copyrighted in 1981; (7) measure one of "Engine of Love," copyrighted in 1984 and 1987; and (8) measure eight of "Parlez-Vous Francais," copyrighted in 1989. Based on this evidence, Prof. Ferrara concludes that the Phantom Song was derived from Lloyd Webber's earlier works, and not from Repp's "Till You" song.

2. Musical Similarities Between the Phantom Song and Public Domain Literature

Prof. Ferrara also contends that there are numerous works in existing public domain literature that contain melodic phrases as similar to the Phantom Song as the Phantom Song is similar to "Till You." Specifically, Prof. Ferrara states that there are five consecutive melody notes common in pitch content between measures ten and 11 of the Phantom Song, measures 12 and 13 of J.S. Bach's "Praludium" and measures 14 and 15 of Edvard Grieg's "Melodie".[10]

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9. As plaintiffs emphasize, however, these examples illustrate merely eight instances of the use of a perfect-fourth interval sequence out of more than 150 Lloyd Webber compositions.

10. Plaintiffs argue, however, that an aural examination of the public domain music cited by the defendants reveals that this music sounds nothing like either "Till You" or the Phantom Song.

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In addition there are six consecutive melody notes common in pitch content between measures ten and 11 of the Phantom Song and several measures of the following musical compositions: (1) measures three and four of the Cantorial Chant: "Sh'ma Yisroayl;" (2) measures 25 and 26 of Edvard Holst's "Glittering Sunbeams;" and (3) measures 11 and 12 of G.B. Allen's "None Can Tell." According to Prof. Ferrara, the melodic phrase that appears in phrase one of the Phantom Song is thus a commonplace musical idea and not unique.

B. Professor Hitchcock's Report

Plaintiffs' expert, Prof. H. Wiley Hitchcock ("Hitchcock"), professor of music at the City University of New York, disputes Prof. Ferrara's findings, contending that Prof. Ferrara uses a flawed and misleading methodology of changing and then isolating three-to-six note fragments of the published music at issue to reach his conclusions. Prof. Hitchcock contends further that (1) "Till You" and the Phantom Song are strikingly similar; (2) "Till You" is not similar to Lloyd Webber's "Close Every Door" song; and (3) "Till You" is not similar to "Heaven on Their Minds" and "Benjamin Calypso."[11]

In support of his contention that "Till You" and the Phantom Song are strikingly similar, Prof. Hitchcock points to the fact that (1) the basic rhythmic and metrical character of "Till You" and the Phantom Song are identical; (2) the rhythmic aspects of the melodic phrases in "Till You" are echoed in the Phantom

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11. As the defendants' motion for summary judgment is not based on any alleged similarities between "Till You" and either "Close Every Door," "Heaven on Their Minds" or "Benjamin Calypso," however, the Court finds that Prof. Hitchcock's second and third conclusions are irrelevant for the purposes of this Opinion.

Song; and (3) although the two pieces differ in harmony, key and mode, they are identical in harmonic rhythm. Based on this evidence, Prof. Hitchcock concludes that "Till You" and the Phantom Song share significant similarities in every musical element and in the interaction of these musical elements.

V. Musical Similarities Between Prior Webber Songs and Other Works

Plaintiffs contend further that Lloyd Webber has a history of copying from other pieces when composing his musical works. In support of this contention, plaintiffs point to the fact that Lloyd Webber's song "I Don't Know How To Love Him," written for the musical *Jesus Christ Superstar*, is copied from the slow movement of Mendelssohn's violin concerto. Plaintiffs also contend that Lloyd Webber copied his song "1969" from Beethoven's "Fur Elise." According to the plaintiffs, Lloyd Webber also borrowed from the music of Paganini when he composed his "Variations." In addition, Lloyd Webber's song "Memory," from the musical *Cats*, bears a remarkable similarity to Larry Clinton's 1942 music "Bolero In Blue."[12]

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12. In response, defendants contend that Mendelssohn's "Violin Concerto," Paganini's "A Minor Caprice" and Beethoven's "Fur Elise" were in the public domain long before Lloyd Webber's works were created. With respect to Clinton's "Bolero In Blue," defendants contend that there is no evidence that (1) Lloyd Webber had access to Clinton's work prior to composing "Memories;" (2) "Bolero In Blue" is a protected work; or (3) Clinton or anyone on his behalf ever asserted a claim that Lloyd Webber's "Memories" infringes "Bolero In Blue."

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DISCUSSION

I. Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must initially satisfy a burden of demonstrating the absence of a genuine issue of material fact, which can be done merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The nonmoving party then must meet a burden of coming forward with "specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e), by "a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. at 322.

The Court "must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion." *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 249 (2d Cir. 1985); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Hathaway v. Coughlin*, 841 F.2d 48, 50 (2d Cir. 1988); *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). But the Court is to inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), and to grant summary judgment where

the nonmovant's evidence is merely colorable, conclusory, speculative or not significantly probative. *Id.* at 249-50; *Knight v. United States Fire Ins. Co.*, 804 F.2d at 12, 15; *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

To determine whether the nonmoving party has met his or her burden, the Court must focus on both the materiality and the genuineness of the factual issues raised by the nonmovant. As to materiality, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. A dispute over irrelevant or unnecessary facts will not preclude summary judgment, *id.*, but the presence of unresolved factual issues that are material to the outcome of the litigation mandates a denial of the summary judgment motion. *See, e.g., Knight v. United States Fire Ins. Co.*, 804 F.2d at 11-12.

Once the nonmoving party has successfully met the burden of establishing the existence of a genuine dispute as to an issue of material fact, summary judgment must be denied unless the moving party comes forward with additional evidence sufficient to satisfy his or her ultimate burden under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. at 330, n.2 (Brennan, J., dissenting). In sum, if the Court determines that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1969)); *see also Weg v. Macchiarola*, 654 F. Supp. 1189, 1191-92 (S.D.N.Y. 1987). In copyright infringement cases, courts have regularly granted summary judgment where it is clear that the plaintiff cannot make out the

elements of the claim. *See Siskind v. Newton-John*, 84 Civ. 2634, 1987 U.S. Dist. LEXIS 4084, at *11 (S.D.N.Y. May 22, 1987).[13]

II. Copyright Infringement

In order to prove copyright infringement, plaintiffs must show ownership of a valid copyright and unauthorized copying by the defendants. *See Laureyssens v. Idea Group. Inc.*, 964 F.2d 131, 139 (2d Cir. 1992); *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992); *Folio Impressions. Inc. v. Byer California*, 937 F.2d 759, 763 (2d Cir. 1991). Defendants do not contest that plaintiffs own a valid copyright in the "Till You" song. Accordingly, the Court must consider whether a reasonable jury could conclude that Lloyd Webber copied the "Till You" song in composing the Phantom Song.

A *prima facie* case of copying is established from a showing that a defendant had access to the copyrighted work and that substantial similarities exist between the original work and the infringing work. *Laureyssens v. Idea Group, Inc.*, 964 F.2d at 139; *Folio Impressions, Inc. v. Byer California*, 937 F.2d at 765. A defendant can then rebut this inference of copying "by

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13. While the Second Circuit historically held that a grant of summary judgment is improper whenever there is the slightest doubt as to the facts, *see Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), this holding is no longer good law. *See Heyman v. Commerce and Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975). Rather, "once the moving party has properly supported his summary judgment motion, the nonmoving party must rebut with 'significant probative' evidence." *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978).

showing that its product was independently created despite its similarity to the plaintiff's work." *Gund. Inc. v. Russ Berrie and Co.*, 701 F. Supp. 1013, 1018 (S.D.N.Y. 1988); *see also Novak v. National Broadcasting Co.*, 752 F. Supp. 164, 168 (S.D.N.Y. 1990) (stating that an inference of copying may be rebutted by showing that the work was independently created, either without reference to the plaintiff's work, or by copying a work already in the public domain).

Once copying is established, the plaintiff must show that the copying amounts to an improper appropriation "by demonstrating that substantial similarities relate to protectible material." *Laureyssens v. Idea Group. Inc.*, 964 F.2d at 140. In determining whether the infringed work has been unlawfully appropriated, the Court must consider whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same." *McDonald v. Multimedia Entertainment. Inc.*, 90 Civ. 6356, 1991 U.S. Dist. LEXIS 10649, at *6 (S.D.N.Y. July 19, 1991).

A. Evidence of Access

Defendants contend that plaintiffs cannot prove that Lloyd Webber had access to Repp's "Till You" song prior to composing the Phantom Song. The Court agrees.

Access is defined as " '[h]earing or having a reasonable opportunity to hear the plaintiff's work, in other words having the opportunity to copy.' " *Sylvestre v. Oswald*, 91 Civ. 5060, 1993 U.S. Dist. LEXIS 7002, at *7 (S.D.N.Y. May 18, 1993) (quoting *Intersong-USA v. CBS. Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991)).

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"Generally, in order to show access plaintiffs must demonstrate more than a 'bare possibility' that defendant had access to the work; access must be shown to a 'reasonable possibility.' " *Id.*; *see also Ferguson v. National Broadcasting Co.*, 584 F.2d at 113; *Siskind v. Newton-John*, 1987 U.S. Dist. LEXIS 4084, at *11. In addition, a reasonable possibility of access may not be inferred through speculation or conjecture, *see Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988); *Sylvestre v. Oswald*, 1993 U.S. Dist. LEXIS 7002, at *7, but must be established by probative evidence. *See Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978) (finding speculations and inferences as to access were insufficient to meet defendants' summary judgment challenge), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 849 (1980).

A plaintiff can satisfy his or her burden of proving access by demonstrating either that (1) the infringed work has been widely disseminated; or (2) a particular chain of events exists by which the alleged infringer might have gained access to the copyrighted work. *Sylvestre v. Oswald*, 1993 U.S. Dist. LEXIS 7002, at *8. Lloyd Webber has categorically denied ever having heard of Repp or his music prior to this litigation. While plaintiffs have no direct evidence that Lloyd Webber heard "Till You" prior to composing the Phantom Song, they contend that access can be inferred from the fact that Repp's music was given to Velline, a mutual friend of Repp and Julian Lloyd Webber. Alternatively, plaintiffs argue that access can be inferred from the wide dissemination of the "Till You" song to the public.

First, plaintiffs argue that access can be inferred from the fact that a cassette recording of Repp's music was given to Velline, who was also a friend of Julian Lloyd Webber and an

acquaintance of Lloyd Webber. While courts have often found access when an alleged infringer and an intermediary occupy positions "such that it is natural that information possessed by one would be imparted to the other," *see Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1356 (C.D. Cal. 1984), a finding of access here is not supported by the evidence. In fact, Velline cannot recall whether the cassette tape of Repp's music in his possession included the "Till You" song. In addition, Velline testified that he did not meet either of the Lloyd Webbers prior to 1983, when Lloyd Webber alleges that he composed the melody for the Phantom Song, and had only met Lloyd Webber on one occasion. Finally, Velline testified that he did not discuss or distribute Repp's music to either of the Lloyd Webbers. Accordingly, the Court finds that any nexus that exists between Velline and Lloyd Webber is insufficient to justify an inference of access on this basis.

Second, plaintiffs contend that access can be inferred from the wide distribution of the "Till You" song. The Second Circuit has recognized that a plaintiff may establish access by proving that there has been "wide dissemination" of the copyrighted work. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (finding access where plaintiff's song was "Number One" on the United States Billboard Charts and one of the "Top Thirty Hits" in England). Where the copyrighted work has only been published to a limited audience, however, access cannot be inferred absent evidence that the defendants had a reasonable opportunity to view the work. *See Intersong-USA v. CBS, Inc.*, 757 F. Supp. at 281 (dismissing plaintiffs' claim of radio access where there was no proof that the defendants' songwriters heard the song); *Novak v. National Broadcasting Co.*, 752 F. Supp. at 170 (no genuine issue of fact regarding access despite fact that plaintiff's skits were broadcast several times on a national television show); *Jewel*

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Music Pub. Co. v. Leo Feist, Inc., 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (finding no access to plaintiff's song despite fact that 4,000 copies were distributed to various broadcasting stations and artists, and 5,626 copies, 168 orchestrations and 198 band arrangements were sold); *see also Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986) (finding fact that plaintiff had performed his song around the country did not establish access where no evidence that defendant's songwriters visited any of the places of performance during the relevant time period); *Selle v. Gibb*, 741 F.2d 896, 902 (7th Cir. 1984) (finding no more than a bare possibility that defendants had access to the plaintiff's song where song had been performed two or three times in the Chicago area and sent to eleven publishing companies); *Jason v. Fonda*, 526 F. Supp. 774, 776-77 (C.D. Cal. 1981) (fact that 200 to 700 copies of plaintiff's book were available in Southern California bookstores "creates no more than a 'bare possibility' that defendants may have had access to plaintiff's book"), *aff'd*, 698 F.2d 966 (9th Cir. 1982).

In the case at hand, plaintiffs point to the more than 38,000 copies of the "Till You" song that they allege were distributed in album, cassette tape and sheet music form in support of their contention that "Till You" was widely disseminated. Plaintiffs have no documentary proof, however, of the number of copies of the "Till You" song that were actually distributed to the public during the relevant time period. Instead, plaintiffs merely contend that Repp personally ordered copies of the "Till You" recording from various manufacturers and that these copies are no longer in his possession. Such evidence does not prove that the "Till You" song was disseminated to the general public during the relevant time period. Rather, the copies could have been disseminated, if at all, after Lloyd Webber composed the Phantom Song.

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In addition, plaintiffs point to the testimony of Repp's employees that "thousands" of recordings of the *Benedicamus* album were distributed. This testimony does not prove wide dissemination of the "Till You" song, however, as it does not specify quantity, time and place of distribution. Plaintiffs' evidence that 100 recordings of the "Till You" song were shipped to a distributor in Australia similarly lacks details as to time and place of distribution. In any event, Lloyd Webber did not travel to Australia until August 1985, one month after the Phantom Song was performed at his Sydmonton home. Accordingly, the Court finds that plaintiffs' evidence of "wide dissemination" does not rise above the level of pure speculation.

Plaintiffs next argue that Repp's music was widely advertised, as K&R distributed a tabloid newspaper advertising Repp's work to more than 300,000 people between 1978 and 1985, including public libraries, and sent out mailings to retail stores. Aside from failing to submit any evidence in support of this allegation, however, the Court finds that the fact that K&R may have distributed newspapers and mailings advertising Repp's music does not establish that the "Till You" song was advertised as a distinct musical composition.

Plaintiffs' remaining proof of access consists of evidence that the "Till You" song was advertised and performed in a specialized religious market. Specifically, plaintiffs contend that (1) Repp performed the "Till You" song at convention centers, churches, universities and theaters; (2) the *Benedicamus* recording was released at three religious conventions; (3) the *Benedicamus* album was advertised in newspapers handed out at catholic churches across the United States; and (4) the *Benedicamus* album was frequently broadcast on a catholic college radio station. As Lloyd Webber composes liturgical

works, among others, plaintiffs argue that he could have had the opportunity to hear the "Till You" song prior to composing the Phantom Song. The Court finds, however, that the mere fact that Lloyd Webber composes liturgical works and is "fond of church music," *see* the Webber Dep. at 67-68, 259, does not establish either that he visited any of the places at which Repp's "Till You" song was performed, or had access to the *Benedicamus* recording during the relevant time period. Accordingly, as plaintiffs have failed to submit any evidence that Lloyd Webber had a reasonable opportunity to hear the "Till You" song prior to composing the Phantom Song, the Court finds that plaintiffs have failed to establish the access element of their copyright infringement claim.

B. Substantial Similarity

Plaintiffs next contend that the "Till You" song is so "strikingly similar" to the Phantom Song as to preclude the possibility of independent creation, and that, therefore, access to "Till You" can be inferred as a matter of law. "In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation." *Arnstein v. Porter*, 154 F.2d at 468-69. Accordingly, where the copyrighted work and the infringing work are "strikingly similar," the test for proof of access is less rigorous. *See Gaste v. Kaiserman*, 863 F.2d at 1067. However, the "striking similarity between pieces of popular music must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions." *Id.* at 1068-69. Thus, striking similarity "is not merely a function of the number of identical notes that appear in both compositions," *Selle v. Gibb*, 741 F.2d at 903, but also

of the uniqueness of the sections which are asserted to be similar. *Id.* at 904. "To prove that similarities are striking, claimant must demonstrate that such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source." *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).

Upon aural examination of the two songs and consideration of the expert testimony submitted by both parties, the Court finds that any similarities that exist between the two works are not so extensive as to support an inference of copying and improper appropriation without more. While the two melodies share several common notes, the songs differ in tempo and style. In addition, plaintiffs' expert, Prof. Hitchcock, concedes that the two pieces differ in harmony, key and mode. Under the circumstances, the Court finds that the two songs do not share a striking similarity sufficient to justify a finding of copying in the absence of access to the copyrighted work.[14]

C. Independent Creation

A defendant can "rebut the inference of copying by showing that its product was independently created despite its similarity to plaintiff's work." *Gund, Inc. v. Applause, Inc.*, 809 F. Supp.

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14. As the Court finds that plaintiffs have not set forth a *prima facie* case of copying, it need not address whether a reasonable jury could conclude that the defendants unlawfully appropriated plaintiffs' work. The Court notes, however, that, as unlawful appropriation is judged by the response of the ordinary lay observer, *see McDonald v. Multimedia Entertainment, Inc.*, 1991 U.S. Dist. LEXIS 10649, at *6, defendants' expert testimony on this issue is inadmissible. *Id.* (stating that consideration of expert testimony on this issue is improper).

304, 308 (S.D.N.Y. 1993); *see also Intersong-USA v. CBS. Inc.*, 757 F. Supp. at 282 ("defendants could rebut an inference of copying by proving that the work was created independently of the plaintiff's work"); *Novak v. National Broadcasting Co.*, 752 F. Supp. at 170. In the instant case, even if plaintiffs could prove access and substantial similarity, they have not submitted any evidence to controvert the defendants' proof of independent creation.

Defendants have submitted declarations from Lloyd Webber and Brightman detailing the circumstances surrounding the creation of the Phantom Song. Specifically, Lloyd Webber states that he created the Phantom Song at his Sydmonton home in late 1983, in order to showcase Brightman's vocal talents. Tapes of the Phantom melody were sent to an English director and lyricist in 1984. In October 1984, a demonstration tape of the Phantom Song was recorded, and in July 1985, the Phantom Song was performed as part of the first act of a musical play.

Plaintiffs have not submitted any evidence to contradict defendants' proof that the Phantom Song was created in the manner detailed above. Instead, they argue that Lloyd Webber's prior history of copying from other composers rebuts his claim of independent creation. Specifically, plaintiffs submitted evidence that Lloyd Webber (1) copied "I Don't Know How To Love Him" from the slow movement of Mendelssohn's violin concerto; (2) copied his song "1969" from Beethoven's "Fur Elise" (3) borrowed from the music of Paganini when he composed his "Variations;" and (4) copied from Larry Clinton's "Bolero In Blue," when he composed the song "Memory." Even assuming such evidence is admissible under Fed. R. Evid. 404(b), however, the Court finds that plaintiffs have not disproved Lloyd Webber's allegations of independent creation,

as their evidence does not point to any prior findings of copyright infringement. *Compare Pret-A-Printee, Ltd. v. Allton Knitting Mills, Inc.*, 1981-1982 Copy. L. Rep. (CCH) ¶ 25,447 (S.D.N.Y. Sept. 16, 1982) (finding that defendants' past record of copyright infringement indicates a practice of copying despite claims of independent creation).

Plaintiffs' remaining argument is that Lloyd Webber and Brightman are interested parties, and that their allegations of independent creation are therefore incredible. Nonetheless, mere hope that a fact-finder will disbelieve the testimony of witnesses on the issues of access and independent development is not sufficient to defeat a motion for summary judgment. *See Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1213 (E.D.N.Y. 1981), *aff'd*, 697 F.2d 301 (2d Cir. 1982); *see also Modern Home Inst., Inc. v. Hartford Accident and Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975) ("If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented."). Accordingly, the Court finds that the defendants' uncontradicted evidence of independent creation negates any claim of infringement.[15] *See Novak v. National Broadcasting Co.*, 752 F. Supp. at 171.

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15. Defendants have also submitted expert testimony indicating that the Phantom Song was derived from Lloyd Webber's earlier works rather than from the "Till You" song. While such evidence is relevant to the issue of whether the two works are more likely due to copying or independent creation, *see McDonald v. Multimedia Entertainment, Inc.*, 1991 U.S. Dist. LEXIS 10649, at *5, the Court finds that defendants' expert evidence in this case does not conclusively rebut an inference of copying as a matter of law.

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II. State Law Claims

As plaintiffs' federal claims for copyright infringement fail, there is no further basis for federal jurisdiction. In addition, as plaintiffs and several of the defendants are residents of New York, complete diversity of citizenship is lacking. *See* 18 U.S.C. § 1332. Accordingly, plaintiffs' state claims of unfair competition and deceptive trade practices under Ill. Rev. Stats., ch. 121-1/2, §§ 261-272, and 311-317 are dismissed for lack of subject matter jurisdiction. *See DBC of New York. Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 418 (S.D.N.Y. 1991) (dismissing unfair competition claim for lack of subject matter jurisdiction following court's dismissal of federal claims); *Howe v. Reader's Digest Ass'n*, 686 F. Supp. 461, 467 (S.D.N.Y. 1988) (dismissing pendent state law claims for lack of jurisdiction after granting summary judgment dismissing plaintiff's federal claims).

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is granted, and the complaint is dismissed. The parties shall appear before the Court for a pretrial conference with respect to defendants' counterclaims on Wednesday, October 12, 1994, at 10:30 a.m.
SO ORDERED.

s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 3, 1994

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of February one thousand nine hundred and ninety-eight.

Dkt No: 96-9691

Repp

Appellant

v

Weber

Appellee

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Andrew Lloyd Webber, Really Useful Group, PLC, Really Useful Group, Incorporated, MCA Records, Inc. Hal Leonard Publishing Corporation, and Polygram Records, Incorporated.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador,
Administrative Attorney

APPENDIX D — DECLARATION OF ANDREW LLOYD WEBBER IN SUPPORT OF SUMMARY JUDGMENT DATED JUNE 17, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 91 Civ. 0906 (SWK)

RAY REPP and K&R MUSIC, INC.,

Plaintiffs,

- against -

ANDREW LLOYD WEBBER, *et al.*,

Defendants.

DECLARATION OF ANDREW LLOYD WEBBER IN SUPPORT OF SUMMARY JUDGMENT

ANDREW LLOYD WEBBER declares, under penalty of perjury, under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, the truth of the following:

1. I am the individual defendant and a counterclaim plaintiff in the action before this Court. I am also a director and principal shareholder of defendant and counterclaim plaintiff The Really Useful Group Limited, sued herein as The Really Useful Group, PLC. ("RUG"). I am the composer of the musical composition entitled "The Phantom of the Opera" (the "Phantom Song").

2. I have personal knowledge of the facts set forth herein. I submit this declaration in support of the motion by all

defendants for summary judgment in their favor, dismissing plaintiffs' claims in this action.

3. During the course of my professional career, I have written the music for approximately 310 published compositions. Among others, I have created the music included in the dramatico-musical works entitled "Joseph and the Amazing Technicolor Dreamcoat", "Jesus Christ Superstar", "Cats", "Evita", "Starlight Express", "Song and Dance", "Aspects of Love", and "The Phantom of the Opera". In July 1993, my newest musical entitled "Sunset Boulevard" based on the movie of the same name, will premiere in London.

4. Since 1968, my works have been performed all over the world. Currently, there are 27 productions of my works in North America, Europe, Australia and Japan.

5. During the course of my professional career, I have been honored to receive many awards for my work, including, among others, the American Tony, Grammy and Drama Desk Awards and the English Laurence Olivier Awards for "Evita", "Cats" and "Phantom of the Opera". A more complete list of the most significant awards and honors I have received is attached hereto as Exhibit A.

6. Other than this litigation, I have only once before been named a defendant in a copyright infringement suit. Ironically, in that case brought in the High Court of Justice in London, entitled *Brett v. Lloyd Webber*, the plaintiff also claimed that the Phantom Song copied his song. After it was demonstrated to plaintiff that I had written the Phantom Song prior to his composition, he withdrew the claim and the English Court dismissed the action.

Appendix D

7. I am currently, as I have been throughout my life, resident and domiciled in England, where the bulk of my time has been spent. I have visited the United States of America from time to time since 1978 when the plaintiffs claim that Repp composed the song "Till You". However, such visits have been of limited duration, and for specific business purposes, which have occupied the greater part of my time. Prior to this litigation, I had never heard of Ray Repp or K & R Music Inc. Until this lawsuit, I had never heard of or heard any of Repp's work or seen sheet music thereof, including "Till You". Plaintiffs have been unable to provide, particularize, or even suggest any location, event or occasion at which I was present and at which the song "Till You" or any other composition of Repp was performed or available. Plaintiffs' allegation that the Phantom Song was copied from "Till You" is entirely unfounded.

MY CREATION OF THE PHANTOM SONG

8. In or about late 1983, I was at Sydmonton Court, my home in Sydmonton, England. Sarah Brightman, who later became my wife, was with me as my guest. Ms. Brightman is possessed of a remarkable vocal range and has the unique ability to sing in two separate musical registers. I had determined that I wanted to write a song for her, which would be in the nature of a vocal exercise to show off her range and which would allow her to sing in both her "head" or "soprano" voice (high range) and her "chest" (low range) voice.

9. I have two pianos at Sydmonton and I often compose there. I recall being at Sydmonton, sitting at the piano, and composing the melody for the song which ultimately became titled the Phantom Song. At that time, there were no lyrics and I had no specific intent as to how the song would ultimately be used.

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10. While I rarely play music for anyone before it is completely finished, since this song was being composed specifically for Ms. Brightman, I called upon her to work with me as I wrote the song. As I played the piano and she sang, I would modify the melody, working out how her voice could move from her chest to her head. I recall working with the melodic phrases that are in issue in this suit. I was genuinely excited by the process of creating what I believed to be an interesting new work in the nature of a virtuoso piece for a particular woman.

11. I do not recall noting down the music composed that day on paper. Indeed, it was and is not my practice to notate music I have written immediately upon its composition. Although I did not complete the entire song that day, the whole of the melody at issue was composed at that time at Sydmonton.

12. The song then lay dormant as I became involved in other projects during late 1983 and early 1984, including, among other things, "Starlight Express". In or about February or March of 1984, I delivered to Trevor Nunn, a prominent English director with whom I was working on "Starlight Express", a tape containing various songs I had written which were in various stages of completion. One of the songs on the tape was the Phantom Song, although not yet known by that name or conceived of as part of a show based on the Phantom of the Opera.

13. I did not retain a copy of that tape and Mr. Nunn has not been able to provide me with a copy of that tape. Mr. Nunn never completed lyrics for the melody delivered to him.

14. During the summer of 1984, I became deeply involved in the composition of my "Requiem" mass. "Requiem" premiered

in September 1984 at the annual festival I hold each summer at Sydmonton court.

15. During that same period, I went to see Ken Hill's production of "Phantom of the Opera". That musical production was presented as farce, embodying a pastiche of arias from the mainstream of operatic works. Mr. Hill had wanted Ms. Brightman to play the role of Christine in his show, which she had been unable to consider. Having attended that performance, discussions were thereafter entered into with Mr. Hill about producing the show for small theatres.

16. As I considered an involvement with the Ken Hill project, I had the idea that the song that I had created at Sydmonton Court for Ms. Brightman could work with that project, and would make for a fun pop record. I turned my attention to the song again at that time. I also solicited the services of Michael Batt, a well known English lyricist, to write lyrics for the song.

17. In or about late September 1984, I delivered to Mr. Batt in England a tape containing a rough version of the song and my narrative concerning thoughts that I had on the song's development. A copy of that tape is provided to the Court herewith as Exhibit B. The composition of the music of the Phantom Song was completed at or about this time.

18. In October 1984, a demonstration version of the song was recorded at Air Studios in London, sung by Ms. Brightman and Mr. Batt. That version of the song was never released and I decided not to become involved with the Ken Hill production of Phantom of the Opera.

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19. In or about the Spring of 1985, I found a copy of the original "Phantom of the Opera", written by Gaston Leroux, in a second hand bookshop. Upon reading the book, I recognized the power of the work as a love story and decided to write a new and original musical based on the book. I set to work with Richard Stilgoe, the lyricist for "Starlight Express", to develop the idea. We decided to premiere it that summer at Sydmonton.

20. By the summer of 1985, I had written a number of compositions for and had structured with Mr. Stilgoe the first act of the musical play "The Phantom of the Opera". On July 5, 1985 an abbreviated version of the first act of the "Phantom of the Opera" was premiered at the annual Sydmonton Festival. Annexed hereto as Exhibit C is a copy of the program from that event identifying the songs performed, including the Phantom Song.

21. During August 1985, I vacationed with Sarah Brightman (by then my wife) in Australia. While there, I worked out the outline for the second act of the musical play "The Phantom of the Opera".

22. In late December 1985, the Phantom Song was recorded by Sarah Brightman and Steve Harley. A single was released in England in early January 1986.

23. "The Phantom of the Opera" premiered in London at Her Majesty's Theatre on October 9, 1986. It opened on Broadway at the Majestic Theatre on January 26, 1988.

24. It is my recollection that the principal melody of the Phantom Song did not materially change from the time it was first composed by me at Sydmonton in 1983, through the

recordings made by Ms. Brightman with Messrs. Batt and Harley in 1984 and 1985, the performance at Sydmonton in 1985 and the professional production of The Phantom of the Opera on the stage in 1986.

25. At the time that I was composing the Phantom Song, I had no conscious awareness of its similarity to earlier created works of mine. I believed that I was creating a wholly original and new work by me. At the time of orchestrating the Phantom Song, I first noticed the similarity between certain measures of the Phantom Song and measures of my earlier composition "Close Every Door" from "Joseph and the Amazing Technicolor Dreamcoat", written by me and copyrighted in 1969.[1] It was not until this litigation and the resultant scrutiny of my earlier works, that I also recognized the derivation and evolution of the Phantom Song from "Benjamin Calypso", also from "Joseph", written by me and copyrighted in 1975 and "Heaven On Their Minds", a song written by me and copyrighted in 1970.

26. I do not find these similarities between the Phantom Song and these earlier works of mine to be either surprising or

1. Although counterclaim plaintiffs are not presently moving for summary judgment on their counterclaim that plaintiffs' "Till You" copies my earlier composition "Close Every Door", I am compelled to note that there are seven identical notes in a row between Repp's "Till You" copyrighted in 1978 and my "Close Every Door" copyrighted in 1969. This, coupled with plaintiff Repp's admitted access to and knowledge of my work commencing in or about 1969 or 1970, the wide availability and exploitation of "Joseph" and the striking use by Mr. Repp of the lyric "you opened every door" in "Till You" — the mirror image of my title "Close Every Door" — leads to the inescapable conclusion that it is plaintiff Repp who is the copyist here, and not me.

remarkable. I, as many composers, naturally and unconsciously draw upon my earlier work in creating new music and in developing a consistent and identifiable corpus of work.

s/ Andrew Lloyd Webber
ANDREW LLOYD WEBBER

Dated: London, England
June 17, 1993

APPENDIX E — DECLARATION IN SUPPORT OF SUMMARY JUDGMENT DATED JUNE 17, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0906 (SWK)

RAY REPP and K & R MUSIC, INC.,

Plaintiffs,

-against-

ANDREW LLOYD WEBBER; THE REALLY USEFUL GROUP, PLC; THE REALLY USEFUL COMPANY, INC.; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INC.; AND DOES 1-10,

Defendants.

DECLARATION IN SUPPORT OF SUMMARY JUDGMENT

SARAH BRIGHTMAN declares, under penalties of perjury, under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, the truth of the following:

1. I am an actress and vocalist. I was married to Andrew Lloyd Webber from March 1984 to October 1990. I have personal knowledge of the facts set forth herein and submit this declaration to set forth my recollections regarding the creation of the musical composition entitled "Phantom of the Opera" (the "Phantom Song").

Appendix E

2. In or about the fall of 1983, I was a guest at Andrew Lloyd Webber's home in Sydmonton, England. There is a piano in the music room at Sydmonton where, both during this period and throughout our marriage, Andrew would compose music.

3. I specifically recall Andrew composing the music of what eventually became titled the Phantom Song at Sydmonton that fall. Andrew had spoken to me of his desire to write a song which would demonstrate my broad vocal range. I remember being in the music room with Andrew; he sitting at and my standing by the piano and being asked to sing what he played. As he played and I sang, Andrew would modify the melody and chords, working out how my voice could move from a "chest" voice to a "head" voice.

4. As is his practice, Andrew did not write down the music as he composed it and would get up and walk around the house and grounds and then return to the piano.

5. In or about September 1984, I accompanied Andrew to a meeting with Michael Batt. Mr. Batt was to produce a recording of the song earlier composed by Andrew at Sydmonton for me. I recall Mr. Batt playing the song at that meeting to ascertain whether the key was comfortable for me. A recording of the Phantom Song was made at Air Studios in October 1984 in London, sung by me and Mr. Batt.

6. Thereafter, Andrew determined to write a new musical based on the book "The Phantom Of The Opera". In July 1985, Andrew premiered at the eleventh annual festival at Sydmonton a shortened version of the first act of his new musical work "The Phantom of the Opera", which was then planned to be produced in London the following Spring. I played the lead

female role of Christine, with the Phantom role being played by Colm Wilkinson. We sang the Phantom Song at the Sydmonton Festival.

7. In late December 1985, the Phantom Song was recorded as a single, sung by me and Steve Harley. This recording was released in England in January 1986.

8. I subsequently played the role of Christina in both the London and New York productions of "The Phantom of the Opera", and appeared on the cast album.

9. It is my recollection that the principal melody of the Phantom Song did not materially change from the time of its composition by Andrew at Sydmonton, through the recordings with Messrs. Batt and Harley, the performance at Sydmonton and the professional production of The Phantom of the Opera on the stage.

10. Prior to this litigation I had never heard of plaintiffs Ray Repp or K & R Music, Inc. I have never heard any of Mr. Repp's music, including the song "Till You".

s/ Sarah Brightman
Sarah Brightman

Dated: London, England
JUNE 17, 1993

APPENDIX F — AFFIDAVIT OF LAWRENCE FERRARA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED JUNE 17, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0906 (SWK)

RAY REPP and K & R MUSIC, INC.,

Plaintiffs,

-against-

ANDREW LLOYD WEBBER; THE REALLY USEFUL GROUP, PLC; THE REALLY USEFUL COMPANY, INC.; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INC.; AND DOES 1-10,

Defendants.

AFFIDAVIT OF LAWRENCE FERRARA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAWRENCE FERRARA, being duly sworn, deposes and says that:

Appendix F

1. I am a Professor of Music at New York University in New York, New York. I submit this affidavit in support of defendants' motion for summary judgment on plaintiffs' copyright infringement claims. As discussed in detail below, I have concluded that defendant Lloyd Webber's song at issue, "The Phantom of the Opera", is derived from earlier works created by Lloyd Webber which pre-date plaintiff Repp's song, "Till You", and that, therefore, the Phantom Song was independently created by Lloyd Webber.

Education and Professional Background

2. In 1971, I received a Bachelor of Arts Degree in music from Montclair State College. In the summer of 1972, I attended Yale University Graduate School of Music's summer program on a fellowship in piano performance. In 1973, I received a Masters Degree from Manhattan School of Music in a program that combined piano performance with studies in musicology. In 1978, I received a Ph.D. in Music from New York University ("NYU"), where I currently teach.

3. I began teaching music at the college level in 1974, as an instructor at Union College in New Jersey. In 1975, I joined the adjunct facility at NYU as an instructor of piano in the department of music and music professions. In 1979, I became a full-time faculty member in music at NYU as an Assistant Professor of Music. In 1986, I was promoted to Associate Professor of Music and received tenure at NYU in 1987. In 1992 I was promoted to Professor of Music. Within the department of Music and Music Professions at NYU, I was Director of Piano Studies from 1979 to 1982 and since 1983 have been Director of all programs in music performance. Since 1987, I have also been Director of Doctoral Studies in our

department. I have authored and/or co-authored three published books, and fourteen articles. Topics about which I have written include, among others, 1) music analysis; 2) philosophy and music; 3) keyboard harmony and improvisation; and 4) research methodologies in music. My publications are set forth in Exhibit A.

Summary of Analysis Conducted, Materials Reviewed, and Conclusions

4. I have reviewed and played on the piano the published sheet music (Exhibit B hereto) and listened to the sound recording on the K & R Music label, of plaintiff Ray Repp's "Till You", copyrighted in 1978. I have reviewed and played on the piano the published sheet music (Exhibit C hereto) and listened to the sound recording on the Polygram Records label, of defendant Andrew Lloyd Webber's song "The Phantom of The Opera" (the "Phantom Song"), copyrighted in 1986. I also have reviewed and played on the piano all of the published sheet music composed by defendant Lloyd Webber for the following dramatico-musical works: *Joseph and The Amazing Technicolor Dreamcoat, Jesus Christ Superstar, The Phantom of the Opera, Aspects of Love, Evita, Cats, Requiem, Song and Dance, Starlight Express*. I have also listened to sound recordings of each of these theatrical musicals.

5. During the course of my review of the corpus of defendant Lloyd Webber's music, which he composed over a period of approximately 20 years, I found certain recurrent musical themes, phrases, and other musical similarities in his music. As I analyzed Mr. Lloyd Webber's substantial body of music, I also became familiar with certain forms of expression of musical ideas which he would employ, and which I came to recognize as characteristic of his style and technique.

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6. In my review and analysis, I found that a portion of the melody of the Phantom Song which allegedly infringes upon "Till You" exists in another composition written by defendant Lloyd Webber and copyrighted in 1975, namely "Benjamin Calypso", which is from Lloyd Webber's musical *Joseph and The Amazing Technicolor Dreamcoat*. That melodic phrase also exists in very similar form in another composition written by defendant Lloyd Webber and copyrighted prior to 1978, in 1970, entitled "Pilate's Dream" from defendant's musical *Jesus Christ Superstar*.

7. Significantly, I also found that a portion of the melody of the composition "Till You", copyrighted by Mr. Repp in 1978 and which he claims is infringed upon by the Phantom Song, exists *identically* in music written by defendant Lloyd Webber and copyrighted in 1969, namely, in his composition "Close Every Door", from his musical *Joseph and The Amazing Technicolor Dreamcoat*. That same portion of the melody in "Till You" is also found in very similar form in another composition written by defendant Lloyd Webber and copyrighted prior to 1978, entitled "Heaven On Their Minds", copyrighted in 1970, from defendant's musical *Jesus Christ Superstar*.

8. I also reviewed a substantial number of compositions in the extant public domain literature. As discussed below, the extant public domain literature contains a number of compositions which contain melodies that are as similar to a portion of the melody in "Till You" as the Phantom Song is to that portion of the "Till You" melody.

9. My conclusions are set forth in greater detail and supported below. In the next section of my affidavit, using audio

and visual musical examples, I describe the musical similarities between Lloyd Webber's compositions "Phantom Song", "Benjamin Calypso", "Pilate's Dream", "Heaven On Their Minds", and "Close Every Door" to demonstrate that all of the music at issue in the Phantom Song is directly traceable to and derived from Andrew Lloyd Webber's own earlier compositions, all of which were copyrighted before "Till You".[1]

10. In the section following that analysis, also using audio and visual musical examples, I describe the musical similarities between Repp's "Till You" and defendant Lloyd Webber's "Close Every Door" to demonstrate that a portion of the melody of Repp's "Till You", which is allegedly infringed by the Phantom Song, exists almost identically in Lloyd Webber's earlier composed "Close Every Door".

11. Finally, in the last section of my affidavit, again using audio and visual musical examples, I discuss compositions in the extant public domain literature which contain melodic phrases that are as similar to a portion of the melody in "Till You" as the Phantom Song is to that portion.

THE MUSIC OF THE PHANTOM SONG CLAIMED TO INFRINGE "TILL YOU" EXISTS IN AND IS DERIVATIVE OF LLOYD WEBBER'S MUSIC COMPOSED AND COPYRIGHTED PRIOR TO "TILL YOU"

12. Music is comprised of certain distinct and identifiable components, each of which can be isolated and described

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1. I also demonstrate that the Phantom Song contains other signature characteristics of Lloyd Webber's compositional style found in other of his compositions.

separately. Three primary musical elements of a composition are (1) melody; (2) harmony; and (3) rhythm. Melody is ". . . a coherent succession of pitches . . . melody is in fact nearly synonymous with tune." *The New Harvard Dictionary of Music*, ed. Don Michael Randel (1986 Harvard Univ.), at pp. 481-82. The melody of all the songs discussed herein is the part of the song which is sung, known as the voice part. A melody line, or phrase, is comprised of a number of musical notes, each of which is separated by specific intervals, which are quantified by the number of steps (or distance) between the notes. Each note in the melody bears a time value, *i.e.*, the length of time for which it is played on an instrument or sung. The rhythm of the song is determined by the time value of notes and silences, as well as accentuation, grouping of notes, and contour. The harmony of a song is "[t]he relationship of tones . . . as they sound simultaneously." *The New Harvard Dictionary of Music*, ed. Don Michael Randel (1986 Harvard Univ.) at p. 366. Harmony is also the essence of how one chord relates to the next and how the chords progress from the first chord in a phrase of music to the last. A chord is comprised of three or more notes sounded simultaneously.

13. The melody, rhythm and harmony of a song flow through bars or measures, delineated on sheet music by two vertical lines, appearing as follows: |___|. The music contained between the two lines fills a space or span of time and is interchangeably called a bar or a measure. In order to clarify my analysis and as a visual aid for the Court, I have sequentially numbered in the Musical Examples set forth below the measures of the songs discussed.

14. Another primary component of a musical composition is its structure. The structure of a song relates to, for example,

the use of introductory passages, repetition of music, and the number and location of repeated passages of music, commonly referred to as verses and choruses.

15. The rhythms of both "Till You" and the Phantom Song are not distinctive. Each relies on rhythmic patterns that are common to hundreds of songs in both the popular and classical domains. Any harmony that is found to be similar between "Till You" and the Phantom Song also is not distinctive and can be located in many popular songs.[2] Similarly, the structure of "Till You" is quite common; there are thousands of songs, both popular and classical, that use the same overall structure of "Till You". The structure of the Phantom Song is significantly different from the structure of "Till You", and is less common. The entirety of the melody of the Phantom Song is more distinctive, as is the entirety of the melody of "Till You". One could change the harmonies and adjust the rhythms, and even add extended repetitions of sections in order to change the structure, and both lay and professional listeners would be able to identify the melody of the Phantom Song or the melody of "Till You" in those altered states. In Audio Tape Example 8, *infra*, I demonstrate that rhythmic and harmonic changes do not alter recognizable melodies.

16. As discussed in the next two sections below, the portions of the melodies at issue in "Till You" and the Phantom Song bear similarities. However, *all* of these melodic similarities are directly traceable to and have their roots in several of Lloyd Webber's pre-dated works, all of which were copyrighted before "Till You".

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2. There are many musical dissimilarities between "Till You" and the Phantom Song which are not discussed herein as they are not necessary or relevant to the analysis herein.

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The Music At Issue In "Till You"

17. The music of "Till You" is published on two pages. There is no introductory section in the published sheet music. "Till You" contains a total of 78 measures, consisting of 15 full measures and a short measure on the first page, and two repeats thereof, and 15 full measures and a short measure on the second page, and one repeat thereof. Plaintiffs concede that the first page of the sheet music of "Till You" contains the only music claimed to have been infringed by the Phantom Song. The measures of music appearing on the first page of "Till You" are called Section A; the remaining measures on page two are called Section B. Section B is not discussed further as it is not at issue in this case.

18. Section A of "Till You" is comprised of an overall theme, which appears in measures 1-8 and which is then repeated, in altered form, in measures 9-16 (only the first beat of measure 16 is in Section A). The overall theme of "Till You" in Section A (measures 1-16) is comprised of two separate identifiable musical phrases called here Phrase One and Phrase Two.

19. Phrase One of "Till You" is comprised of measures 1-4, as set forth in Musical Example 1, which repeats almost identically in measures 9-12:[3]

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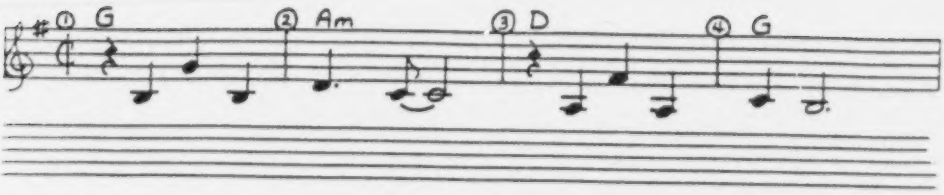
3. All musical examples are set forth in a common popular music format which is constituted of the melody written in rhythm with harmony listed in letters above the melody. All melodies, rhythms and lettered harmonies have been copied from the analogous published sheet music.

Appendix F

MUSICAL EXAMPLE #1

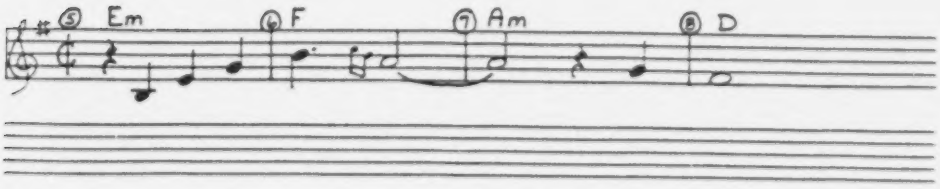
REPP: "TILL YOU"



20. Phrase Two of "Till You" is comprised of measures 5-8 set forth in Musical Example 2, and is repeated in altered form in measures 13-16.

MUSICAL EXAMPLE #2

REPP: "TILL YOU"



The Music At Issue In The Phantom Song

21. The Phantom Song is comprised of 127 measures. Measures 1-9 of the Phantom Song comprise the Introduction thereof. Measures 10-28 are essentially repeated in almost identical form at measures 32-50; 54-71 (there is a different rhythm in the bass in this section); and 80-97. Measures 10-28 are referred to herein as Section A.

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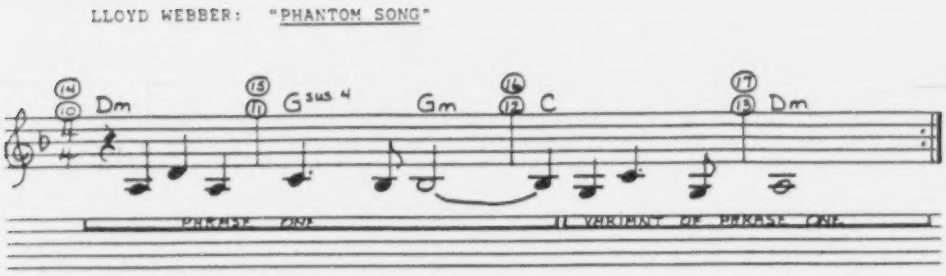
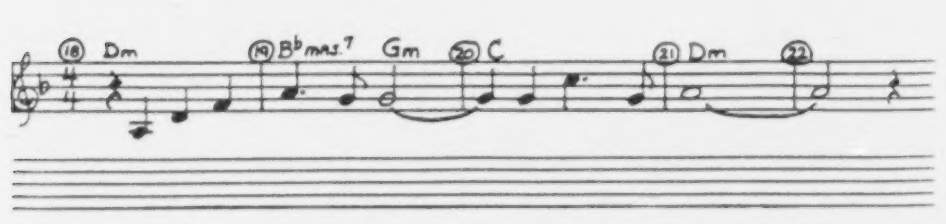
22. Section A is comprised of three phrases. Phrase One of Section A is comprised of measures 10-13, set forth in Musical Example 3 below. Phrase One also can be subdivided into two sub-phrases because the melody in measures 12-13 is simply a variant of the melody in measures 10-11. Phrase One repeats almost identically at measures 14-17. Measures 32-39; 54-61; and 80-87 of the Phantom Song are essentially repeats of measures 10-17.

MUSICAL EXAMPLE #3



23. Measures 18-22 (only the first three beats of 22) are called Phrase Two of the Phantom Song, and are set forth below in Musical Example 4. Measures 40-44; 62-66; and 88-92, are essentially repeats of measures 18-22.

MUSICAL EXAMPLE #4

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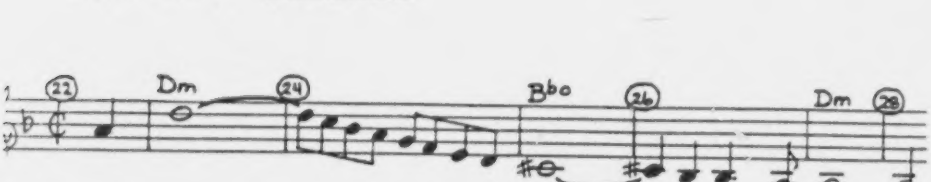
24. Phrase Three of Section A of the Phantom Song is comprised of measures 22 (starting on the fourth beat of 22) through 28 (only the first two beats of 28), which repeat at measures 45-50; 67-71 and 93-97. Phrase Three of Section A, measures 22-28, is set forth below in Musical Example 5.

MUSICAL EXAMPLE #5

LLOYD WEBBER: "PHANTOM SONG"

25. Measures 1-9; 29-31; 51-53; 72-79; and 93-127 of the Phantom Song, which include the Introduction and its repeats, and certain other musical material are not at issue in this case.

26. Phrase One of the Phantom Song (measures 10-13) is analogous to Phrase One of "Till You", as set forth in ¶ 19 above and Musical Example 1. Phrase Two of the Phantom Song (measures 18-22) is analogous to Phrase Two of "Till You" set forth in ¶ 20 above and Musical Example 2. In Phrase Three of the Phantom Song, measures 22-25 recall musical material from the Introduction which is not at issue. Also in Phrase Three of the Phantom Song, measures 26-28 are comprised of a variant of Phrase One. Insofar as the musical material in measures 26-28 of the Phantom Song may be traceable to Phrase One of the Phantom Song, it need not and will not be considered separately in the comparative analysis

below of the music at issue in Phrases One and Two of the Phantom Song.

27. It is my opinion, based upon indisputable and empirical melody comparisons, that Phrase One of the Phantom Song is derivative of Lloyd Webber's own earlier "Benjamin Calypso" (copyrighted 1975) and "Pilate's Dream" (copyrighted 1970), and that Phrase Two of the Phantom Song is derivative of those two songs and Lloyd Webber's own earlier "Close Every Door" (copyrighted 1969) and "Heaven On Their Minds" (copyrighted 1970).

Transposition Of The Relevant Music In "Till You" And The Phantom Song Into The Same Key

28. In order to meaningfully compare the melodies of the Phantom Song and "Till You", they must be transposed into the same key, or pitch.

29. I have transposed the relevant melody of "Till You" [*i.e.*, Phrases One and Two], which is published in the key of G major, down one full step, to the key of F major. By doing so, I am able to express "Till You" in the same pitch as the key of the Phantom Song, which is D minor, because the key of F major is the "relative major" of D minor.

30. I have set forth below, in Musical Examples 6 and 7, respectively, the transposed versions of Phrases One and Two of "Till You" into D minor:

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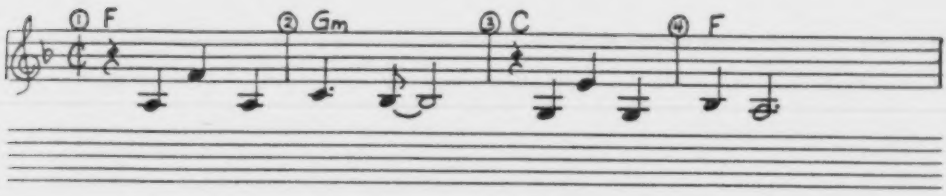
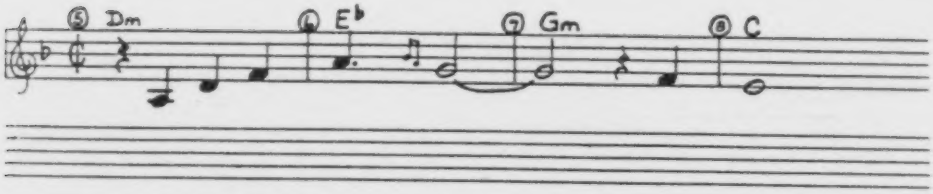
MUSICAL EXAMPLE #6

REPP: "TILL YOU"



MUSICAL EXAMPLE #7

REPP: "TILL YOU"



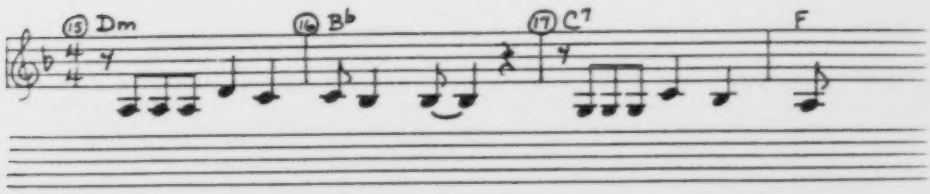
Phrase One Of The Phantom Song Is Derivative Of Lloyd Webber's "Benjamin Calypso" And "Pilate's Dream"

31. The melody in "Benjamin Calypso", of which Phrase One of the Phantom Song is derivative, appears at measures 15-18 of "Benjamin Calypso". The published sheet music of "Benjamin Calypso", defendant Lloyd Webber's composition, copyrighted prior to "Till You" in 1975, is annexed as Exhibit D. Because "Benjamin Calypso" is published in F major, which as noted above is the relative major key of D minor, the key of the Phantom Song, I have not had to transpose it. As is common music analytical practice, the melody of measures 15-18 of "Benjamin Calypso" has been set forth down one octave so

that it is placed in the same melodic range as the Phantom Song and the transposed "Till You". Measures 15-18 of "Benjamin Calypso" are set forth below in Musical Example 8:

MUSICAL EXAMPLE #8

LLOYD WEBBER: "BENJAMIN CALYPSO" c. 1975



32. In Musical Example 9 below, Phrase One of the Phantom Song is set forth directly above the melody of "Benjamin Calypso" contained in Musical Example 8. The same notes which appear in each of the two examples have been coded in the same color.[4] Out of ten melody notes in Phrase One of the Phantom Song (the tied note Bb in measure twelve (12) is not counted as is common musicological practice), there are eight identical notes which line up with the analogous notes of the melody in "Benjamin Calypso". Of a total of twelve possible common harmonic tones, ten are common to both. Furthermore, the harmonic progression of the chords, identified by letter symbols above each measure, is similar.

---

4. Appearing directly behind Musical Example 9, I provide a color code key. Each note which appears in the musical examples has been given its own designated color. No other note will be designated by that color. I have provided this color key and performed the color coding so that, even absent an ability to read music and identify notes by name, this visual aid will allow the Court to discern which notes in the passages at issue are identical pitches.

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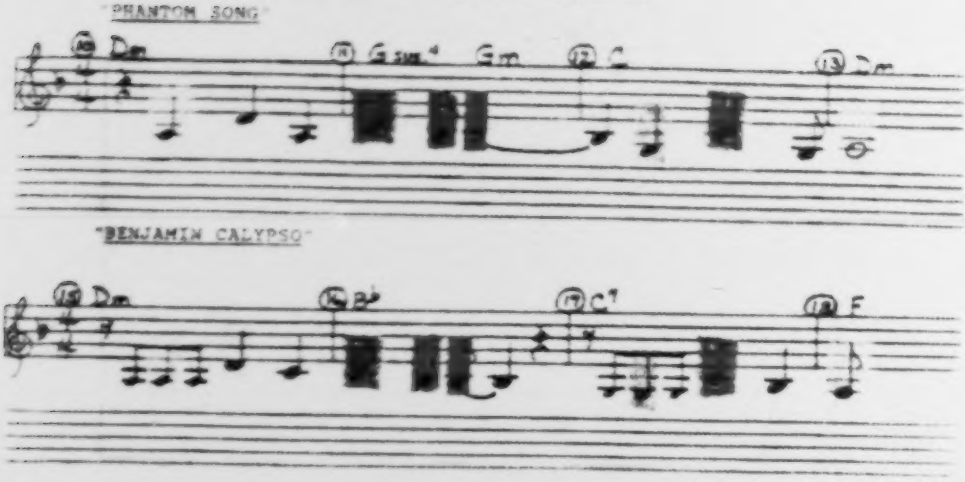
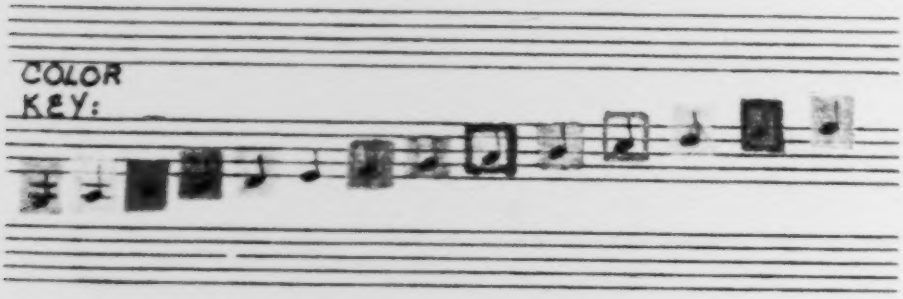
MUSICAL EXAMPLE #9



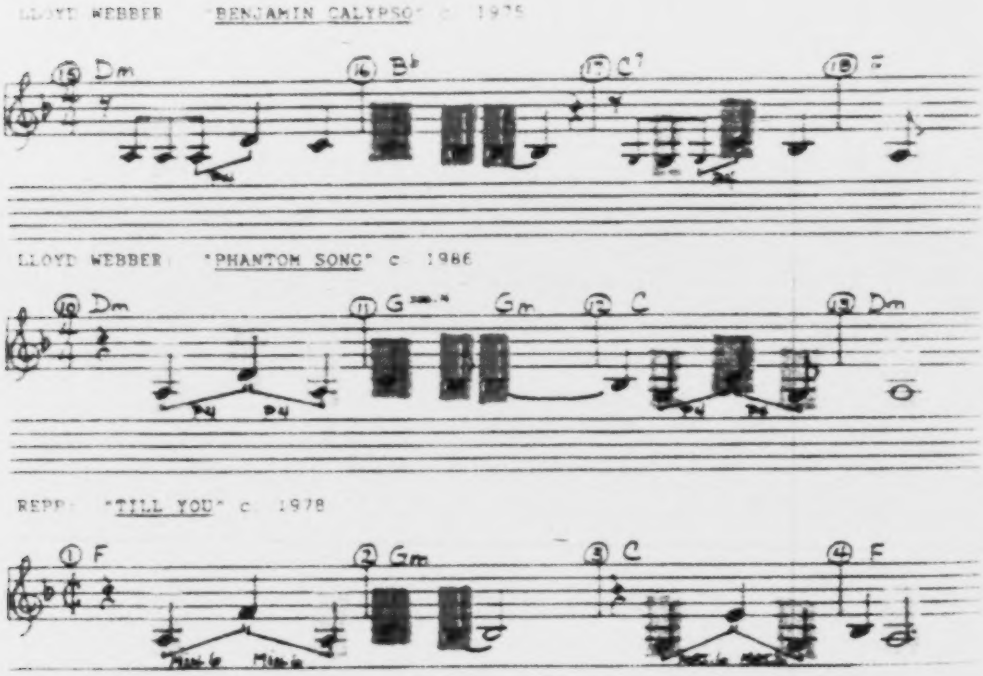
NOTES WITH COLOR KEY



33. Musical Example 10 sets forth Phrase One of the Phantom Song, the analogous music from "Benjamin Calypso" (previously set forth in Musical Example 8), and Phrase One of "Till You". The melodies are again color coded. There are seven melody notes which line up in pitch content identically between Phrase One of "Till You" and Phrase One of the Phantom Song. Thus, there are *more* common melody notes between Phrase One of the Phantom Song and the analogous melody notes in Lloyd Webber's 1975 "Benjamin Calypso" — *eight* — than

there are between Phrase One of the Phantom Song and Phrase One of "Till You" -- *seven* (the tied note B-flat in measure two is not counted as in common musicological practice). The *same* number of common *harmonic* tones exist between Phrase One of "Till You" and Phrase One of the Phantom Song as exist between the Phantom Song and "Benjamin Calypso" — ten.

MUSICAL EXAMPLE #10



P4 = Perfect Fourth *MIN. 6* = Minor Sixth *MAJ. 6* = Major Sixth

34. On Audio Tape Example One, I play the music contained in Musical Example 10 from the three songs to assist the Court in understanding that the melody of Phrase One of the Phantom Song is essentially the same melody as and is thus derivative of the pertinent melody line of Lloyd Webber's own earlier "Benjamin Calypso".

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35. There is a critical melodic *difference* between Phrase One of "Till You" and Phrase One of the Phantom Song that does not exist between Phrase One of the Phantom Song and the relevant measures of "Benjamin Calypso". Viewing Musical Example 10, the first three melody notes of each of the three songs move in an up-down movement.[5] However, both the Phantom Song and "Benjamin Calypso" use the melodic interval of a *perfect fourth*. In the third measure of the analogous phrases in the Phantom Song and "Benjamin Calypso", the interval of a perfect fourth is used again. In significant contrast, in measure one of Repp's "Till You" the interval is a minor sixth and in the third measure the interval is a major sixth. In Audio Tape Example 2, I demonstrate the significant melodic difference that can be readily heard between the perfect fourth in the Phantom Song and the minor and major sixth in "Till You". Given the presence of the interval of a perfect fourth in "Benjamin Calypso" and the Phantom Song, as well as all of the other musical similarities between those two songs delineated above, I have concluded that Phrase One of the Phantom Song is *more* similar to the pertinent measures of "Benjamin Calypso", Lloyd Webber's 1975 work, than Phrase One of the Phantom Song is to Phrase One of the 1978 "Till You".

36. The melodic phrase of Phrase One of the Phantom Song is also similar to a melodic phrase contained in another composition of defendant Lloyd Webber's, copyrighted eight years before "Till You", in 1970, entitled "Pilate's Dream" from the musical *Jesus Christ Superstar*. A copy of the published sheet music of "Pilate's Dream" is annexed as Exhibit E. I set forth below in Musical Example 11, Phrase One of the Phantom

5. The first three notes in "Benjamin Calypso" measure 15 all function as up beats to the fourth note, in common musicological practice, and therefore count as one note.

Song and measures 17-22 of "Pilate's Dream". I have transposed "Pilate's Dream" (measures 17-22) into the same key as the Phantom Song, and the notes of the phrases from both songs are color coded to demonstrate the musical similarities which exist.

37. There are eight out of a possible ten identical common notes in sequence in the melodies of Phrase One of the Phantom Song and the melodic phrase in "Pilate's Dream" set forth in Musical Example 11.[6] Furthermore, of twelve possible common *harmonic* tones, ten are common to both the Phantom Song and "Pilate's Dream". Significantly, these measures in "Pilate's Dream", which song also pre-dates "Till You", like the measures in both "Benjamin Calypso" and Phrase One of the Phantom Song, contain the Lloyd Webber characteristic interval of a perfect fourth, which is not found in Phrase One of "Till You".

38. On Audio Tape Example 3, I play Musical Example 11 to demonstrate the similarity of the melody of the pertinent measures of "Pilate's Dream" and Phrase One of the Phantom Song.

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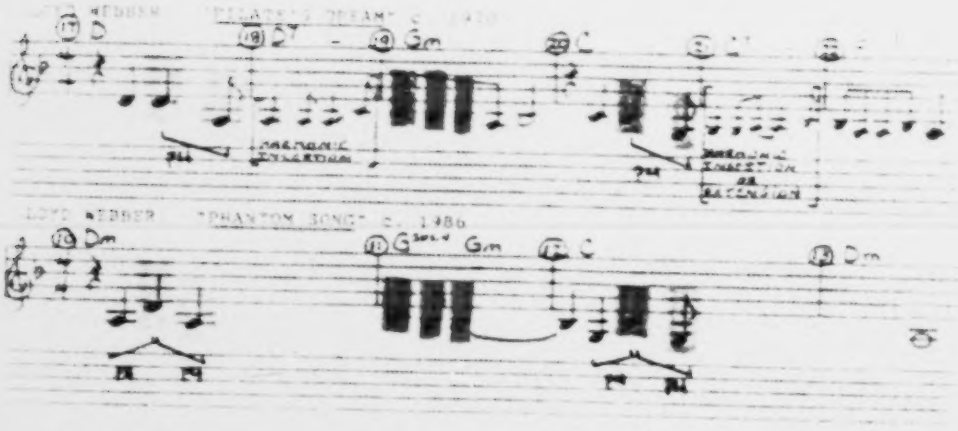
6. Measures 18 and 21 in "Pilate's Dream" simply repeat and anticipate melody notes and extend the harmonic tension in the respective previous measures 17 and 20. This is a common compositional device utilized by many composers for several centuries. Consistent with musicological practice, I have discounted the extended measures 18 and 21 to elucidate the melody common to "Pilate's Dream" and the Phantom Song.

Appendix F

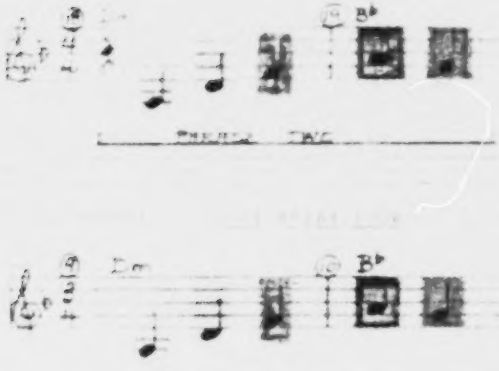
MUSICAL EXAMPLE #11

39. On Audio Tape Example 4, I play the pertinent measures of "Pilate's Dream", measures 15-18 of "Benjamin Calypso", Phrase One of the Phantom Song and Phrase One of "Till You", to assist the Court in understanding the clear derivation of Phrase One of the Phantom Song from Lloyd Webber's own earlier "Benjamin Calypso" and "Pilate's Dream". Audio Example 4 also highlights the significant melodic difference between Lloyd Webber's three works and Repp's "Till You": Lloyd Webber's three songs rely on the melodic interval of a perfect fourth whereas, in contrast, "Till You" relies upon the wholly different melodic intervals of a minor sixth and a major sixth.

40. Based upon the eight identical melody notes common to the Phantom Song and "Pilate's Dream", the presence of the important interval of the perfect fourth in both, and the ten common harmonic notes, I have concluded that Phrase One in

the Phantom Song is derived from "Pilate's Dream", as well as from "Benjamin Calypso".[7]

Lloyd Webber's "Close Every Door", "Heaven On Their Minds", "Benjamin Calypso", and "Pilate's Dream" Are The Sources For Phrase Two Of The Phantom Song

41. The melody in Phrase Two of the Phantom Song, set forth in Musical Example 4 above, is found in measures 9-10 of Lloyd Webber's 1969 "Close Every Door". The published sheet music of defendant Lloyd Webber's "Close Every Door", copyrighted in 1969, is annexed as Exhibit F. Because "Close Every Door" is published in F minor, I have transposed it to the same key as the Phantom Song, D minor. Measures 9-10 of "Close Every Door", transposed to D minor, are set forth in Musical Example 12 directly below measures 18-19 of Phrase Two of the Phantom Song. Again, I have color coded the notes to assist the Court in visualizing the number of common melody notes in Phrase Two of the Phantom Song compared to the pertinent measures of "Close Every Door".

MUSICAL EXAMPLE #12

7. There are further similarities between these earlier Lloyd Webber works and the Phantom Song which support this conclusion. However, I am able to draw the stated conclusion in ¶ 40 based solely upon the identified similarities.

42. As is clear from the above example, all five melody notes in measures 18 and 19 of Phrase Two of the Phantom Song and all five melody notes in measures 9 and 10 of "Close Every Door" line up identically in pitch content. These five notes constitute a substantial portion of the melody of Phrase Two of the Phantom Song, and are clearly traceable to "Close Every Door". In addition, the harmony over these five melody notes is *identical.*

43. After the repeated "G" note in measure 19, the remaining four melody notes in measures 20 and 21 of Phrase Two of the Phantom Song are a *repeat* of the second half of Phrase *One* in the Phantom Song which, as discussed above at ¶¶ 32-40 and Musical Examples 9-11, is derived directly from "Benjamin Calypso" and "Pilate's Dream".

44. In Musical Example 13, I set forth the *entire* Phrase Two of the Phantom Song (measures 18-22), measures 9-10 of "Close Every Door", measures 17-18 of "Benjamin Calypso", and measures 20 and 22 of "Pilate's Dream" to demonstrate that the *entire* melody line of Phrase Two of the Phantom Song — *all nine notes* — is derivative of Lloyd Webber's earlier works, all of which pre-date Repp's "Till You". The melody in the pertinent measures of "Benjamin Calypso" and "Pilate's Dream" has been set forth up one octave so that it is placed in the same melodic range as the analogous measures in the Phantom Song.

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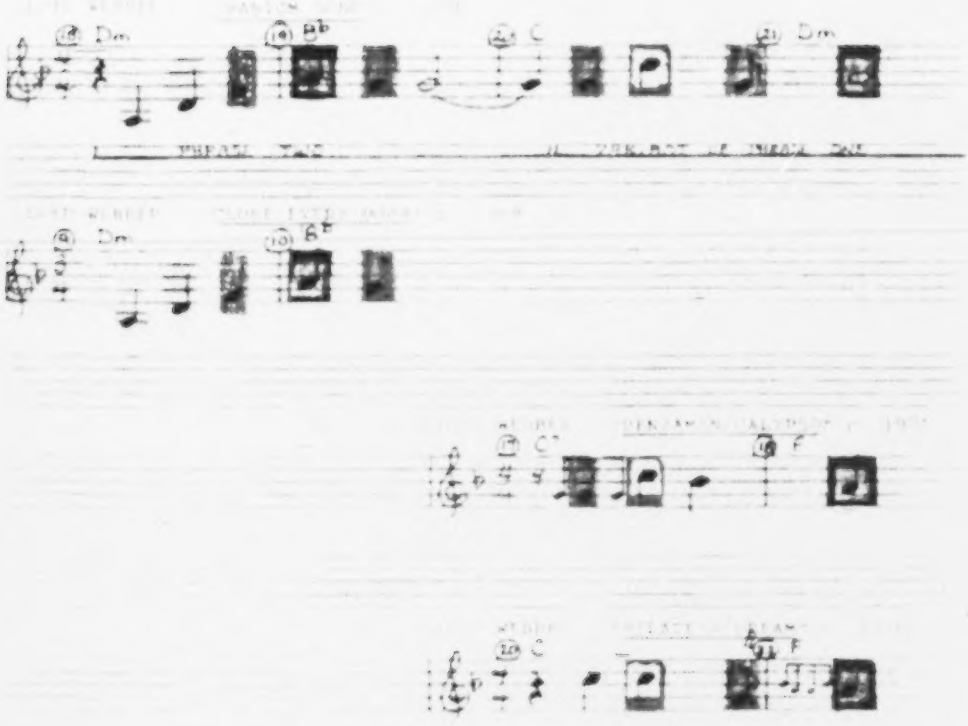
MUSICAL EXAMPLE #13

45. In Audio Tape Example 5, I play the melody in measures 9-10 of "Close Every Door" and the five note melody in measures 18-19 of the Phantom Song, which demonstrates their five common melody notes.[8] In Audio Tape Example 6, I play the entire Phrase Two of the Phantom Song (measures 18-22), and then play the combined measures 9-10 of "Close Every Door" and measures 17-18 of "Benjamin Calypso" to demonstrate that the nine melody – notes of Phrase Two of the Phantom Song are directly traceable and found exactly in the combined measures of these two songs.

8. As discussed below, there is in fact a *greater* melodic similarity between Phrase Two of Repp's "Till You" (1978) and the analogous measures of Lloyd Webber's "Close Every Door" (1969).

Appendix F

Lastly, I play on Audio Tape Example 6, the foregoing example again, substituting only measures 20 and 22 of "Pilate's Dream" for measures 17 through 18 of "Benjamin Calypso", which further demonstrates that the compositional roots and clear derivation of Phrase Two of the Phantom Song lie in Lloyd Webber's earlier works.

46. Lloyd Webber's "Heaven On Their Minds", copyrighted in 1970, provides a compositional source, in addition to measures 9-10 of "Close Every Door", for measures 18-19 of Phrase Two of the Phantom Song. The published sheet music of "Heaven On Their Minds" is annexed as Exhibit G. I have set forth below in Musical Example 14, measures 18-19 of Phrase Two of the Phantom Song and measures 2-3 of the coda of "Heaven On Their Minds". I have not had to transpose "Heaven on Their Minds" because it was written in the same key as the Phantom Song, D minor. Again, I have color coded the notes to reflect the similarities and show that there are, just as with "Close Every Door", five melody notes common to the Phantom Song and "Heaven On Their Minds" in their relevant parts, which line up identically in pitch content.[9] The harmony accompanying the five pitches in common in the melodies of measures 18-19 of the Phantom Song and measures 2-3 of the coda of "Heaven On Their Minds" is identical.

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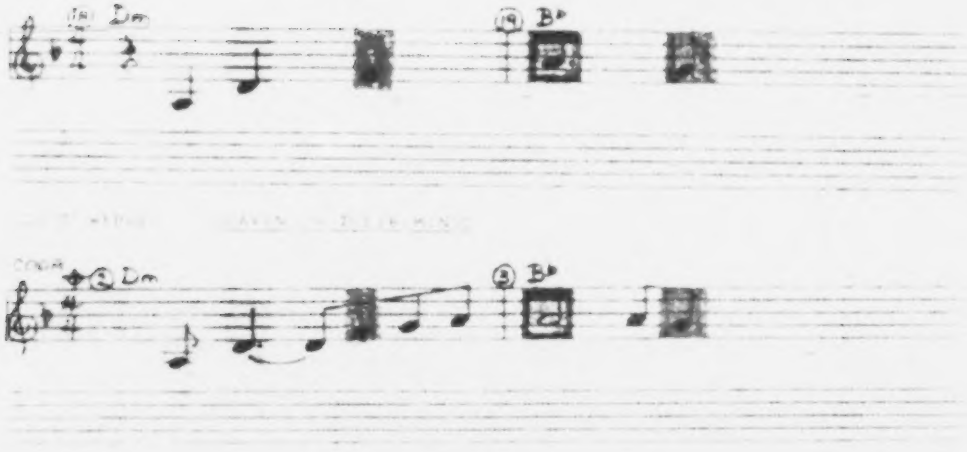
9. The melody in measures 2 and 3 of the coda of "Heaven On Their Minds" (1970) is an embellishment of measures 9-10 of Lloyd Webber's "Close Every Door" (1969). As such, and as is common practice in music analysis, embellishing notes have not been counted, leaving the essential melodic notes which are identical in sequence to the melody in measures 18-19 of the Phantom Song.

Appendix F

MUSICAL EXAMPLE #14

PHRASE TWO OF "TILL YOU" IS FOUND IN LLOYD WEBBER'S "CLOSE EVERY DOOR"

47. I set forth below in Musical Example 15, Phrase Two of "Till You" (as set forth in Musical Example 7 above), measures 9-11 of "Close Every Door" and measures 18-19 of Phrase Two of the Phantom Song. Again, the notes are color coded to reflect the similarities. In contrast to the *five* identical consecutive note pitches common to Phrase Two of the Phantom Song and measures 9-10 of "Close Every Door", there are *seven common consecutive* notes between Phrase Two of "Till You" and measures 9-11 of Lloyd Webber's "Close Every Door", copyrighted 1969, which line up identically in pitch content.[10]

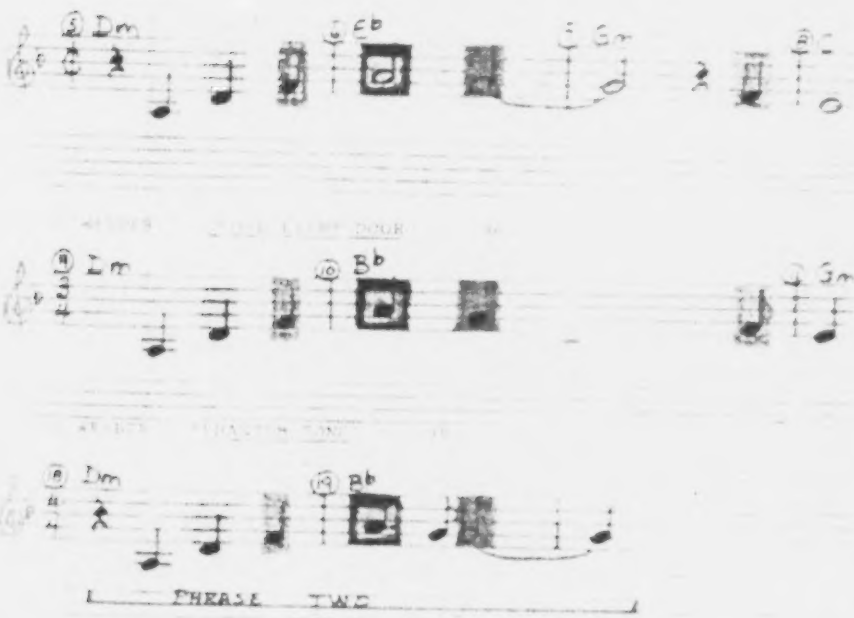
48. The melodic similarity between Phrase Two of "Till You" and measures 9-11 of "Close Every Door" is thus *greater* than the melodic similarity between Phrase Two of the Phantom Song and

10. It is common practice in music analysis not to count embellishing notes, such as the second and third notes in measure 6 of "Till You".

Appendix F

Phrase Two of "Till You". Stated simply, in the *1969* copyrighted composition "Close Every Door", Lloyd Webber wrote the *seven note melody line* demonstrated in Musical Example 15, and — in 1978, almost ten years later — Ray Repp wrote the *identical seven notes in the melody of* "Till You".

49. On Audio Tape Example 7, I play the seven note melody line from measures 9-11 of "Close Every Door" and Phrase Two of "Till You". On Audio Tape Example 7, I also play Phrase Two of the Phantom Song, in which Lloyd Webber uses the first five notes of his seven note melodic phrase copyrighted in 1969. In Audio Tape Example 8, I demonstrate that rhythmic and harmonic changes do not alter recognizable melodies.

MUSICAL EXAMPLE #15

Appendix F

THE PHANTOM SONG CONTAINS "FINGERPRINTS" OF LLOYD WEBBER FOUND IN OTHER COMPOSITIONS BY HIM

50. As discussed in detail above, Lloyd Webber's Phrase One of the Phantom Song appears in his "Pilate's Dream" (copyrighted 1970), "Benjamin Calypso" (copyrighted 1975), and in the Phantom Song (copyrighted 1986). As such, the melody at issue, as well as the accompanying harmony, were well established in Lloyd Webber's musical corpus almost one decade prior to the publication of Repp's "Till You". Given the absence of the important interval of a perfect fourth in Phrase One of Repp's "Till You" and the presence of the perfect fourth interval in all three of Lloyd Webber's songs that use this theme and upon which the melody is based[11], the combined empirical evidence that exists in the music itself demonstrates that Lloyd Webber's Phrase One of the Phantom Song is derived from the earlier works composed by Lloyd Webber.

51. Lloyd Webber's use of intervals of ascending then descending perfect fourths, as in Phrase One of the Phantom Song, can be found in many of his compositions published between 1969 and 1986. In Musical Example 16 set forth below, eight examples of the use of ascending and descending perfect fourth intervals found in Lloyd Webber's overall musical corpus are

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11. As discussed above at ¶ 22, Phrase One of the Phantom Song is four measures in length. However, the melody in the last two measures of Phrase One constitutes a variation of the melody in the first two measures. As seen in Phrase One of the Phantom Song set forth in Musical Example 3, the characteristic movement up a perfect fourth (from A to D) and then down a perfect fourth (from D to A) in measure 10 of the Phantom Song is repeated one note lower in measure 12 with the notes G-C-G. Thus, the first five melody notes of Phrase One of the Phantom Song, in measures 10-11, constitute the core of the theme as it occurs in Phrase One. In common musicological language, measures 12-13 are a "variant" of measures 10-11. At the core of this melody in Phrase One is the use of the interval of the perfect fourth.

notated. They have been transposed to the same pitch level as the Phantom Song. The original published sheet music is attached as Exhibit H. These excerpts are from songs from the following musicals written by Lloyd Webber: *Joseph and The Amazing Technicolor Dreamcoat* (copyrighted 1969 and copyrighted 1975); *Evita* (copyrighted 1976 and 1977); *Cats* (copyrighted 1981); *Starlight Express* (copyrighted 1984 and 1987); and *Aspects of Love* (copyrighted 1989). These examples are but a sampling of use of the ascending and descending perfect fourth intervals in Lloyd Webber's overall corpus and should not be interpreted as an exhaustive presentation of that use by him.

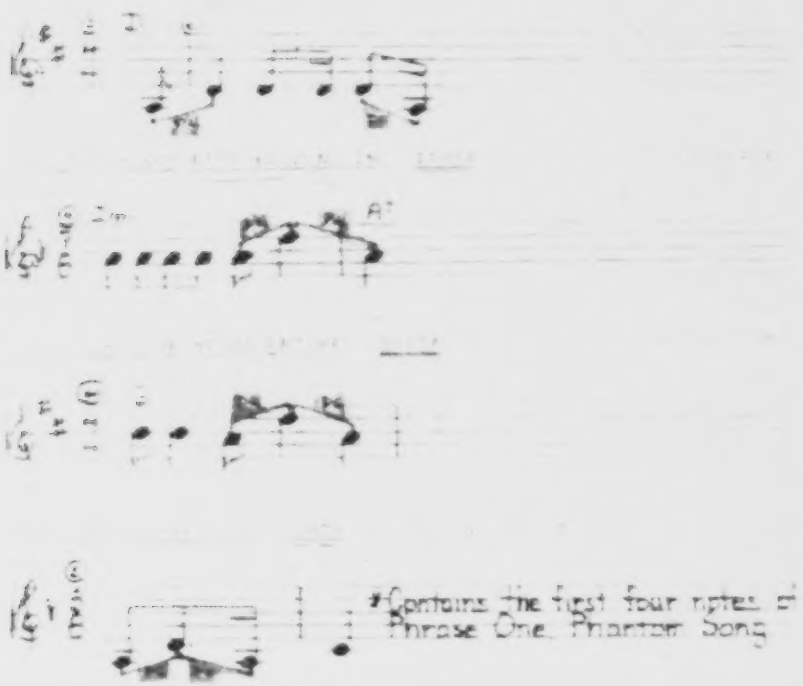
52. Furthermore, there are other compositional devices used in the Phantom Song which act as "fingerprints" of Lloyd Webber's compositional style. These include but are not limited to: harmonic sequence; the use of a lowered VII chord moving to the I chord; 2-1 suspensions that occur on the first beat of the measure within a highly similar harmonic progression; descending stepwise harmonies; and phrase and overall song structures.

Appendix F

MUSICAL EXAMPLE #16

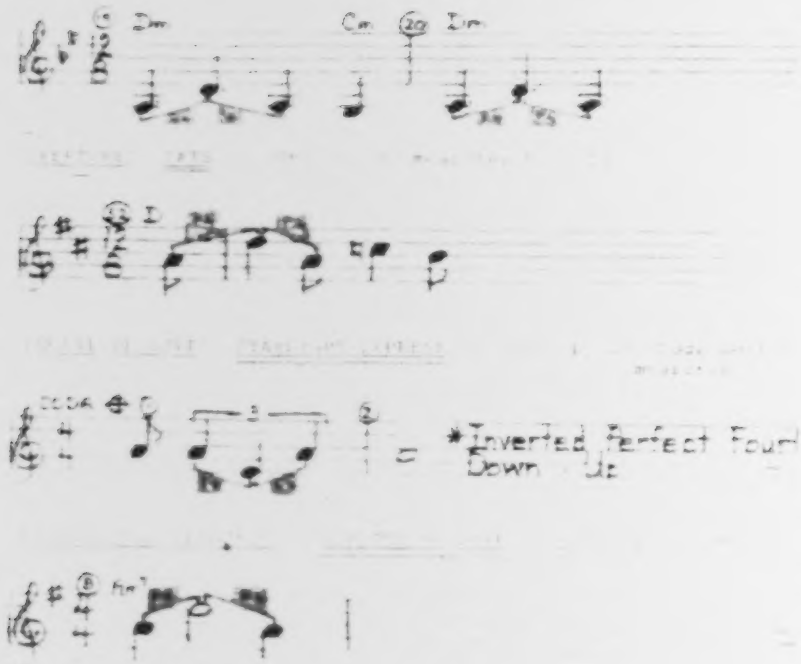
LLOYD WEBBER COMPOSITIONAL "FINGERPRINTS" — THE PERFECT FOURTH

P4 = Perfect Fourth



Appendix F

MUSICAL EXAMPLE #16 (cont'd)

LLOYD WEBBER COMPOSITIONAL "FINGERPRINTS"
THE PERFECT FOURTH

Appendix F

THE MELODIC PHRASE AT ISSUE IN PHRASE ONE OF THE PHANTOM SONG IS TRACEABLE TO THE EXTANT LITERATURE

53. In Musical Example 17, excerpts from five songs which use the identical first five, and in two cases six, notes of Phrase One of the Phantom Song are set forth. These excerpts from works by noted classical composers including J.S. Bach and Edvard Grieg, long pre-date Repp's "Till You" and are in the public domain. When required, all excerpts have been transposed into the same key as the Phantom Song, D minor; some excerpts were already in D minor. The original published versions of the five songs set forth in Musical Example 17 are annexed as Exhibit I. This sampling of excerpts found in the extant literature should not be interpreted as an exhaustive presentation.

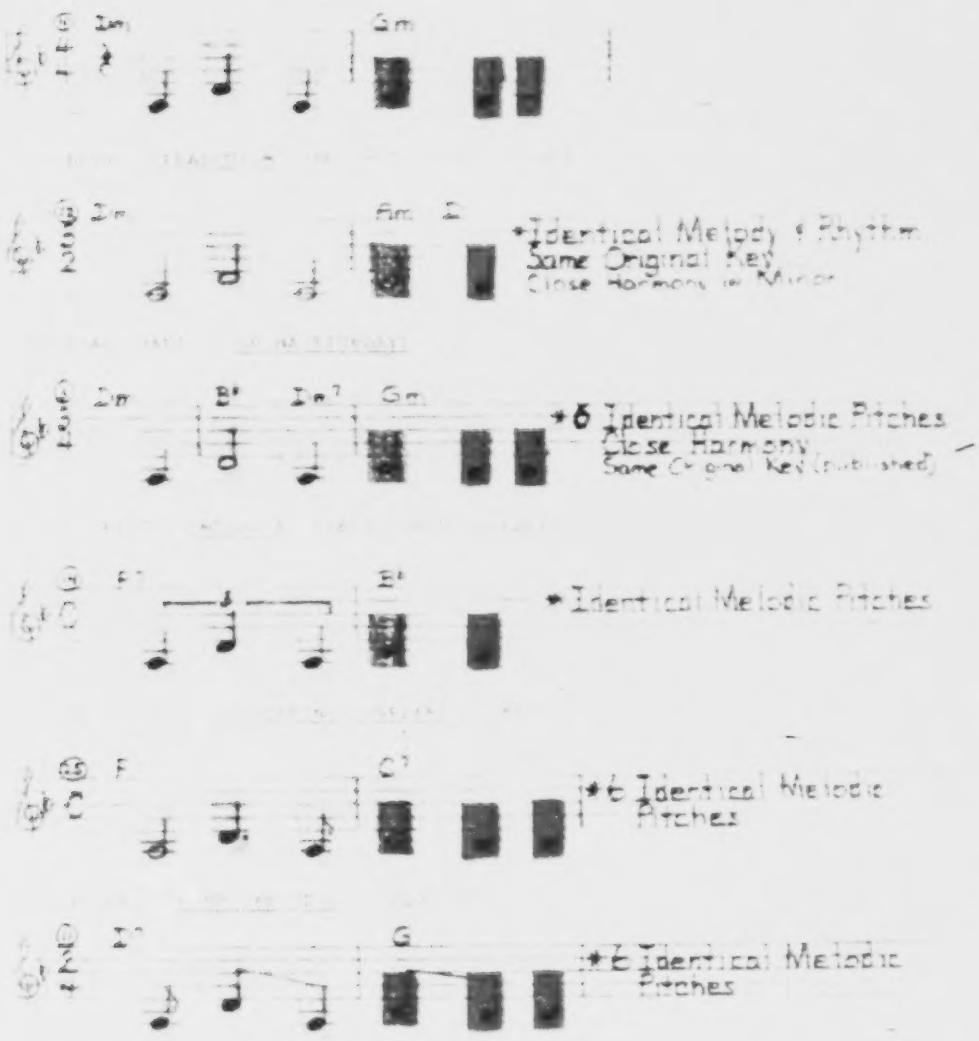
54. To the extent that plaintiff Repp contends that striking similarity exists between Phrase One of "Till You" and Phrase One of the Phantom Song, it is my opinion that this melodic phrase, which readily appeared in other works in the extant literature a century or more prior to Lloyd Webber's usage, and which has been frequently invoked by various composers over time, is in the public domain, a commonplace musical idea and is not unique.

55. In Audio Tape 9, I play the first five, or six, notes from Phrase One of the Phantom Song followed respectively by each of the five excerpts from the extant public domain literature as set forth in Musical Example 17.

Appendix F

MUSICAL EXAMPLE #17
"PHANTOM SONG" PHRASE ONE
ALL EXAMPLES ARE PUBLIC DOMAIN

Extant literature examples containing the first *FIVE* melody notes.



Appendix F

CONCLUSION

56. Concerning Phrase One of the Phantom Song, as a result of the notable absence of the interval of a perfect fourth in Phrase One of "Till You", and the presence of that interval in Lloyd Webber's pre-dated "Benjamin Calypso" and "Pilate's Dream", and other Lloyd Webber works, and the fact that Phrase One of the Phantom Song is more similar to the analogous portions of "Benjamin Calypso" and "Pilate's Dream" than it is to Phrase One of "Till You", it is my opinion that Phrase One of the Phantom Song was derived from Lloyd Webber's earlier works and independently created by him.

57. Concerning Phrase Two of the Phantom Song, given the fact that Lloyd Webber wrote in "Close Every Door" all five identical pitches in melody and an identical harmony over those pitches, and copyrighted said melody and harmony in 1969, and then embellished that melody and retained the identical harmony in "Heaven On Their Minds" in 1970, it is my opinion that Phrase Two of the Phantom Song was derived from Lloyd Webber's 1969 and 1970 works and was independently created by him.

58. In Musical Example 18, I set forth Phrase One and Phrase Two of the Phantom Song, as well as Lloyd Webber's "Pilate's Dream", measures 17, 19, 20 and 22, "Benjamin Calypso", measures 15-18, and "Close Every Door", measures 9 and 10, in order to demonstrate that *every melodic note at issue in the Phantom Song has been derived by Lloyd Webber from his own works which pre-date Repp's "Till You"*. The notes are color coded to reflect the similarities and differences. All examples are at the same pitch as the Phantom Song.

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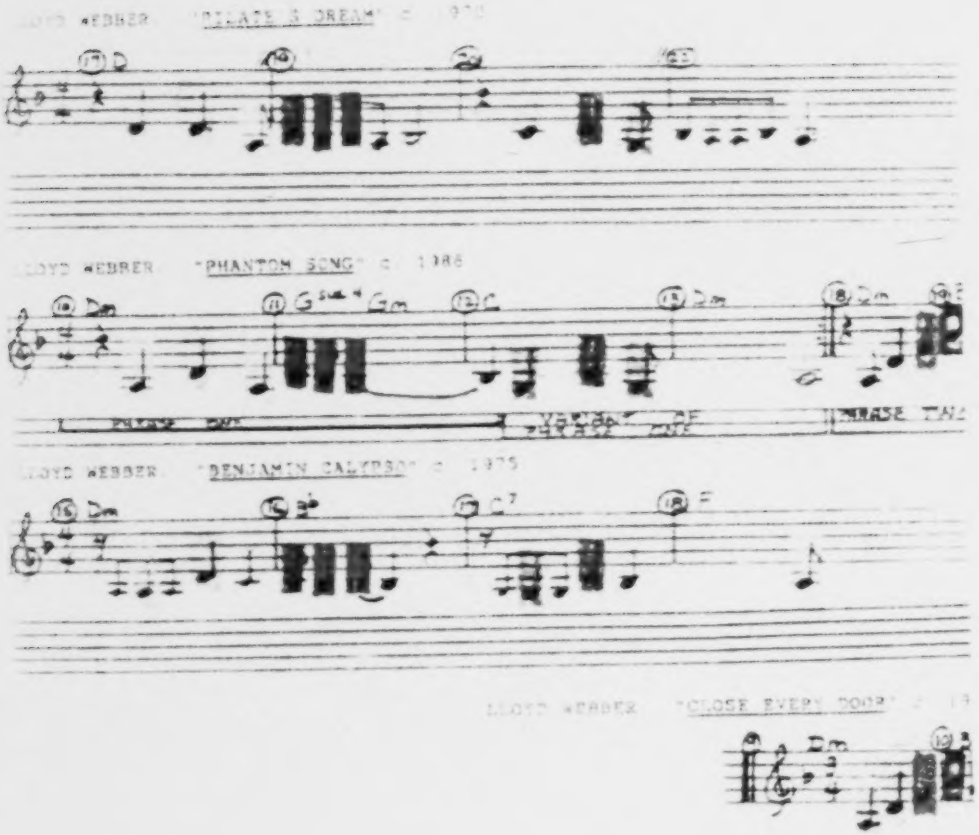
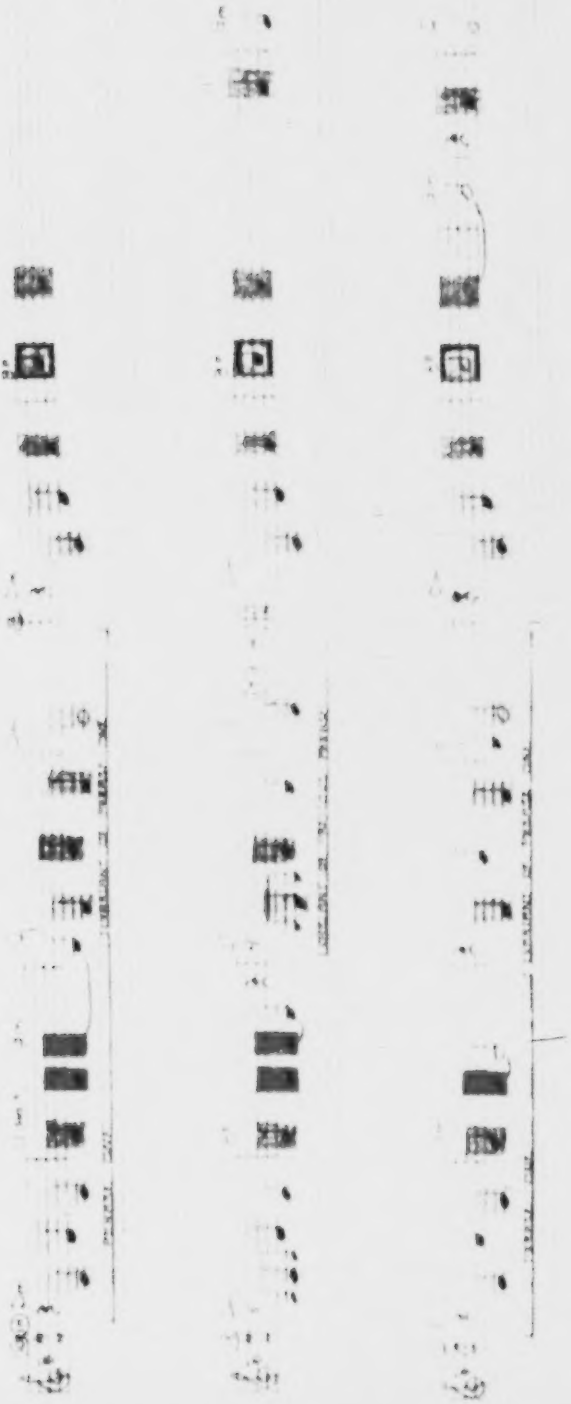
MUSICAL EXAMPLE #18

59. In Musical Example 19, I set forth Phrases One and Two of the Phantom Song and compare them with Lloyd Webber's "Benjamin Calypso", measures 15-18 *combined with* "Close Every Door", measures 9-10. Musical Example 19 continues by setting forth Phrases One and Two of Repp's "Till You" and comparing those measures with Lloyd Webber's pre-dated "Benjamin Calypso", measures 15-18, and "Close Every Door" measures 9-11. This double comparative analysis of the Phantom Song and "Till You" to Lloyd Webber's pre-dated works demonstrates that the

measures at issue in the Phantom Song are *more similar* to the pertinent measures in "Benjamin Calypso" combined with "Close Every Door" than those measures in the Phantom Song are similar to the measures at issue in "Till You". Furthermore, Musical Example 19 demonstrates that the measures at issue in Repp's "Till You" are *more similar* to the pertinent measures in Lloyd Webber's pre-dated "Benjamin Calypso" and "Close Every Door" than those measures at issue in "Till You" are similar to the measures at issue in the Phantom Song. The notes are color coded to reflect the similarities and differences.

Appendix F

MUSICAL EXAMPLE # 19



Appendix F

60. Based on the evidence of Lloyd Webber's regular and repeated usage of the harmony and melody of Phrase One in the Phantom Song since 1970, his use of the melody and harmony of Phrase Two of the Phantom Song since 1969, and the appearance in the Phantom Song of Lloyd Webber compositional "fingerprints", I conclude that Lloyd Webber's Phantom Song is derived from and is wholly consistent with his own writing pre-dating Repp's work. Moreover, there is no evidence that Lloyd Webber utilized or took any compositional device from "Till You" that he had not already created and used in his own earlier works.

61. Based upon the foregoing analysis, because the music at issue in the Phantom Song is directly traceable to Andrew Lloyd Webber's own musical compositions which pre-date "Till You", and because it is more similar to his earlier works than it is to "Till You", defendants' motion for summary judgment should be granted.

s/ Lawrence Ferrara
LAWRENCE FERRARA

Sworn to before me this 17th day of June, 1993.

s/ Anne Shames
NOTARY PUBLIC

APPENDIX G — DECLARATION OF PROFESSOR H. WILEY HITCHCOCK DATED SEPTEMBER 7, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 91 Civ. 0906 (SWK)

RAY REPP and K&R MUSIC, INC.,

Plaintiffs,

v.

ANDREW LLOYD WEBBER, et al.,

Defendants.

DECLARATION OF PROFESSOR H. WILEY HITCHCOCK

H. WILEY HITCHCOCK declares, under penalty of perjury, that the following is true and correct:

1. I am Distinguished Professor of Music in the City University of New York, and founding director (1971) of the Institute for Studies in American Music at Brooklyn College, CUNY.

2. I am the author of *Music in the United States: A Historical Introduction* (1969; 3rd ed., rev. & enl., 1988), books and articles on the music of Charles Ives (notably *Ives: A Survey of the Music*, 1977; corr. ed. 1983), and studies and editions of French and Italian Baroque-era music (especially music by Marc-Antoine Charpentier and Giulio Caccini). With Stanley

Appendix G

Sadie as co-editor, I was chief content editor of the multiple-prize-winning *New Grove Dictionary of American Music* (4 vols.; London & New York, 1988). I am the editor of the Prentice-Hall *History of Music* series (12 vols., most in 2nd or 3rd eds.; 1964-), the music-score facsimile-reprint series entitled *Earlier American Music* (32 vols. to date; 1972-), and the music-score critical-edition series *Recent Researches in American Music* (18 vols. to date; 1973-).

3. I have pursued research under Guggenheim, National Endowment for the Humanities, and Fulbright fellowships and was named, for 1985-86, one among the first annual Getty Scholars at the Getty Center for the History of Art and the Humanities in Santa Monica.

4. 1990-91, I was Visiting Professor at the Harvard University Center for Italian Renaissance Studies (Villa I Tatti, Florence).

5. I am past president of the Music Library Association (1968-70), the American Musicological Society (1990-92), and the Charles Ives Society (1973-92), and I remain on the board of directors of the latter two organizations.

6. My training for a career in music included a B.A. (1944), Dartmouth College (Honors in Music); M. Music (1947) and PhD. in Music (1954) (minor in piano), University of Michigan; private study in France (music theory and composition) with Nadia Boulanger (1949-50).

7. I taught at the University of Michigan School of Music from 1947 to 1961, rising through the ranks to Associate Professor. I then moved to Hunter College of the City University

of New York in 1961, and was Chairman of the Department of Music from 1962-68. In 1971, I was invited to transfer to Brooklyn College, where I have been ever since. My appointment in CUNY was as Professor of Music (1962-80); in 1980 I was named Distinguished Professor of Music.

8. Based on my training, experience and analysis of the relevant music. I authored the statement and report which was submitted in this case in response to defendants' expert interrogatories, on the April 30, 1993 deadline, and is attached to this Declaration. That report reflects my analysis and conclusions regarding the music at issue in this case.

9. I have also reviewed the materials submitted by Prof. Ferrara in support of defendants' motion for summary judgment.

10. His analysis is flawed. As I stated in my original report in this case, one cannot overemphasize ". . . the significance (not to say the paramount importance) — in comparing passages of music, or whole pieces of music, to each other — of *contextual awareness*, and of avoiding a simplistic isolation of one musical element from the others with which it appears, and with which it is *heard*." Prof. Ferrara relies on specious pseudo-statistical presentation — musical note-counting and percentage-taking — and his analyses depend in part on his taking out of context the phrases in question, in part on separating the musical *pitches* of notes from other significant components of the musical experience, and treating those pitches exclusively.

Executed on: September 7, 1993.
New York, New York

s/ H. Wiley Hitchcock
H. Wiley Hitchcock

APPENDIX H — AFFIDAVIT OF PROFESSOR JAMES L. MACK DATED SEPTEMBER 10, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 91 Civ. 0906 (SWK)

RAY REPP and K&R MUSIC, INC.,

Plaintiffs,

v.

ANDREW LLOYD WEBBER, *et al.*,

Defendants.

AFFIDAVIT OF PROFESSOR JAMES L. MACK

JAMES L. MACK, being duly sworn, deposes and says:

1. I submit this Affidavit as further support for the opinions articulated in plaintiffs' answers to defendants' expert interrogatories and the attached report.

2. I am presently a Full Professor and Chairman of the Humanities Department at Harold Washington College in Chicago, Illinois.

3. I received a B.M. Degree in 1952 and an M.M. Degree in 1954 from Roosevelt University. I followed that with two years graduate study in musicology at the University of Chicago. I have been a Ford Foundation Fellow and a Fellow of Contemporary Chamber Players at the University of Chicago.

Appendix H

4. From 1953 to 1955, I was Manager of the Instrumental Music Department of the Gamble-Hinged Music Company in Chicago. From 1955 to 1959, I was Manager of K.O. Asher, Inc., in Chicago, a phonograph record distributor. From 1959 to the present, I have been on the music faculty of the Chicago City Colleges. I have been Chairman of the Humanities Department at Washington College since 1976. From 1974 to the present, I am also a Minister of Music at the First Presbyterian Church of Chicago.

5. In the music industry I have served as a composer, arranger, conductor and/or producer of over 40 albums for such artists as Nancy Wilson, Ramsey Lewis, Jerry Butler, Curtis Mayfield, Kokomo, Linda Clifford and others on the C.B.S., Capitol, Brunswick, Columbia Masterworks and other labels. I have been involved in the production of many radio and television commercials.

6. I have also conducted my own works with the symphony orchestras of Chicago, Dallas, Denver, Cincinnati, Vancouver, Indianapolis, Kansas City, Oregon, Toledo, Atlanta, The Washington National, The London Philharmonic and others. I am also founder and director of the Chicago Renaissance Ensemble.

7. I am also a singer and have had many guest appearances including Grant Park Concerts, Rockefeller Chapel, Contemporary Chamber Players, etc.

8. I am also a flutist and recorder player, and have made guest appearances with The Chicago Symphony Orchestra with Sir Georg Solti and Sir Christopher Hogwood, the University of Chicago Collegium Musicum, the Chicago Chamber

Orchestra, the Lyric Opera, etc. I have produced many recordings and done numerous other solo appearances.

9. I am a Trustee of the National Academy of Recording Arts and Sciences. I am Chairman of the Presbyterian Association of Musicians. I am a member of the American Federation of Musicians, the Screen Actors Guild, the American Federation of Television and Radio Artists, the Cook County College Teachers Union of the A.F.L. and the Alumni Governing Board of Roosevelt University.

11. I have served as a consultant in music plagiarism cases. I have represented Michael Jackson, C.B.S., The Bee Gees, Polygram Distribution. Inc., Paramount Pictures Corp., Brainstorm, Inc., and many jingle producers, plagiarism lawyers and advertising companies. I have generally testified for the defendants in music plagiarism cases. I have testified as an expert for a plaintiff on only one other occasion, when I represented Dr. John Woodbridge in his successful lawsuit against ABC and Paramount Pictures Corporation over the theme song for the television series *The Winds of War*.

12. The statements made and the conclusions expressed in the plaintiffs' interrogatory answers represent my own opinions and conclusions based on my training and experience in the music industry.

s/ James L. Mack
James L. Mack

Subscribed and Sworn to before me this 10th day of September, 1993.

s/ Ursula S. Collins
Notary Public

APPENDIX I — PLAINTIFFS' ANSWERS TO DEFENDANTS' RULE 26(b)(4) INTERROGATRIES DATED APRIL 30, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 91 Civ. 0906 (SWK)

RAY REPP and K&R MUSIC, INC.,

Plaintiffs,

v.

ANDREW LLOYD WEBBER, *et al.*,

Defendants.

PLAINTIFFS' ANSWERS TO DEFENDANTS' RULE 26(b)(4) INTERROGATORIES

Pursuant to Rule 26(b)(4) of the Federal Rules of Civil Procedure, and the orders of this Court, Plaintiffs submit the following responses to Defendants' Rule 26(b)(4) interrogatories:

INTERROGATORIES

1. Identify all persons whom plaintiffs expect to call as expert witnesses at trial. With respect to each such witness,

(a) State the subject matter on which the expert is expected to testify;

(b) State the substance of the facts and opinions to which the expert is expected to testify; and

(c) Summarize the grounds for each opinion.

ANSWER:

1. Professor Wiley Hitchcock
1192 Park Avenue
Apartment 10-E
New York, New York 10128

(a) Professor Hitchcock will testify as a musicologist to his musicological comparisons of the music identified in the Complaint and Counterclaim, as well as the music identified by Webber at his deposition as further support for his Counterclaim.

(b) See attached report of Professor Hitchcock.

(c) See attached report of Professor Hitchcock.

2. Professor James Mack
Harold Washington College
Department of Humanities
30 East Lake Street
Room 406A
Chicago, Illinois 60601

(a) Professor Mack will testify as a musicologist, record producer, arranger, conductor and composer in the field of commercial and symphonic music and will apply this expertise in comparing the music identified in the Complaint and Counterclaim, as well as the music identified by Webber at his deposition as further support for his Counterclaim.

Appendix 1

(b) As to the musics identified in plaintiffs' Complaint, Professor Mack finds that "Till You" and "Phantom" are strikingly similar, and are so similar as to preclude separate creation. This will be demonstrated by a musicological analysis undertaken from both a traditional academic point of view and a contemporary commercial perspective.

As to the Counterclaim, Professor Mack finds that any similarities between "Till You" and "Close Every Door" are insufficient to support the allegations in the Counterclaim. This will be demonstrated by a musicological analysis undertaken from both a traditional academic point of view and a contemporary commercial perspective. Professor Mack reaches the same conclusion with respect to the other musics identified by Webber at his deposition as further support for his Counterclaim.

(c) Professor Mack's opinions are based upon a comparison of the harmonies, melodies, rhythm and overall emotional thrust and ambiance of the musics. Professor Mack has reviewed the report of Professor Hitchcock submitted herewith and is in agreement with Professor Hitchcock's analysis and conclusions in most respects. Professor Mack is able to find, however, that "Till You" and "Phantom" have even more similarities than those identified by Professor Hitchcock. Professor Mack maintains that in commercial music the aural impression is more significant than it is in symphonic music because the music is designed for the lay listener, whose basic impression is derived from what the listener hears. As a result, Professor Mack finds closer harmonic similarities between the two musics than does Professor Hitchcock. Professor Mack's finding in this regard is based upon the practice in commercial music of substituting one chord for another where the function is the same.

Appendix 1

Professor Mack's conclusions with respect to the music at issue in the Counterclaim are based upon application of the same analytical methodologies that he applies in analyzing the music at issue in the Complaint. As a result of his analysis, Professor Mack agrees with Professor Hitchcock's conclusion that "Till You" is distinctly dissimilar from "Close Every Door," as well as the music identified by Webber in his deposition as further support for his Counterclaim. Furthermore, Professor Mack finds that to the extent that there are any similarities, such similarities are insignificant because they do not occur in musically analogous places in the respective songs.

Dated: April 30, 1993

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Appendix 1

STATEMENT

by

H. WILEY HITCHCOCK

(Distinguished Professor of Music, City University of New York; Director, Institute for Studies in American Music, Brooklyn College, CUNY; Past President, American Musicological Society)

In **PART I** of the following I analyze the musical relationships between Ray Repp's "Till You" ("My soul was empty . . .") — hereafter termed "Till You" — and one song in Andrew Lloyd Webber's *The Phantom of the Opera* ("In sleep he sang to me . . .") — hereafter abbreviated as "Phantom Song." My analysis is based on study of the sheet music, for voice and keyboard, of both pieces; "Till You" bears a copyright date of 1978, "Phantom Song" 1986. I have also studied, through listening, sound recordings of both pieces (an unidentified recording of "Till You" performed by a male singer with solo guitar; a recording of "Phantom Song" from "The Premiere Collection," performed by a female singer, a male singer, and an instruments). My analysis is of the *musical* relationships only; not in question, hence not considered in the analysis, are such things as the *texts* of the pieces; their *contexts* (i.e., whether they are independent or part of a larger entity such as a musical, or whether they are to be sung by a congregation or for an audience); their *religiosity or secularity*; or their *medium* (i.e., arrangements of the music for different instrumental and/or vocal forces).

In **PART II** of the following I consider similarly the music of "Till You" in relation to Webber's song "Close Every Door."

Appendix I

In **PART III** of the following I consider similarly the music of "Till You" in relation to Webber's songs "Heaven on Their Minds" and "Benjamin Calypso." (Another song by Webber introduced into the case by him, "Food of Love," was not available for my consideration.)

PART I

One hears a piece of music as a whole, a combination of various elements that fuse together in the listening experience. In order to discuss the musical relationships between one piece and another, however, one must first analyze these elements separately, then try to show how they interact in the pieces as wholes. The most important elements in music of the type of "Till You" and "Phantom Song" — that is, songs consisting of a voice part and an instrumental accompaniment — are (1) the overall structure of the piece (in order to isolate the *portions in question*); (2) the over-all *rhythm* and *meter* of the piece; (3) the *melody* of the voice part; and (4) the *harmony* of the accompaniment. My analysis and comparison of "Till You" and "Phantom Song" are thus organized under the following headings:

(1) Overall structure
(2) Rhythm and meter
(3) Melody
(4) Harmony

Finally, in a fifth section I will consider the interaction of these elements as they co-exist in the music as a whole.

In order to compare the two pieces meaningfully, they both must be expressed in the same key; that is, at the same pitch level. In order to do this, the music of "Phantom Song" must

be expressed one whole-tone (two semi-tones) higher than the published sheet music. I have made this *transposition* in the examples of music from "Phantom Song" that are given and discussed below. (Music examples from "Till You" are at its original pitch level.)

(1) *Overall structure*

Not all the music of "Till You" and "Phantom Song" is in question. To make clear which portions of the songs *are* in question, we should understand the overall structure of the two pieces.

The overall structure of "Till You" is based on 2 sections of music; call them Section A and Section B. In a performance of the entire piece, after a brief introductory section (call it Intro), Sections A and B appear as shown in Example 1:

Example 1. The sectional structure of "Till You."

Intro A B A B A+

(The plus-sign indicates that the last Section A is slightly extended, by way of conclusion.)

The music of the Intro and Section B is unrelated to "Phantom Song"; the portion in question is Section A. Thus, ***only* the music of Section A of "Till You" is considered in detail here**.

"Phantom Song" is a somewhat longer piece than "Till You"; its overall structure is based on an Introductory section (call it Intro), a principal section (call it Section A), and a lengthy

concluding section (call it Close), which begins when the male singer speaks the phrase "Sing, my angel." In a performance of the entire piece, these sections are heard as shown in Example 2:

Example 2. The sectional structure of "Phantom Song."

Intro A Intro A^1 Intro A^2 Intro A^3 Close

(The superscript numbers 1, 2, and 3 following the recurrences of Section A indicate that its music is repeated each time at a different pitch level — in a different key — than before. The Intro music is also slightly altered each time, to help make a transition to the new level of Section A.)

The Intro and Close sections are unrelated to "Till You"; the portion in question is Section A. Thus, ***only* the music of Section A (and its variant appearances as A^1, A^2, and A^3) of "Phantom Song" is considered in detail here.**

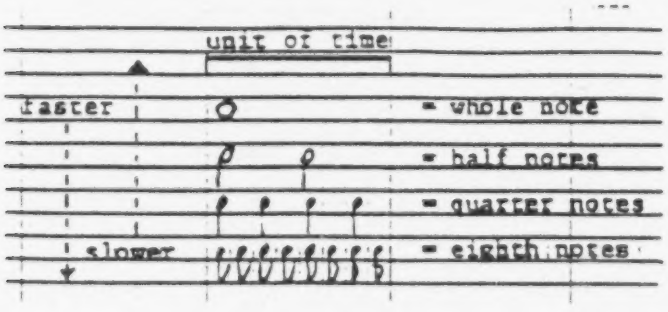
It is important to underline that *Section A in both pieces is not only the portion in question but the principal and most important section of the music.* In "Till You" it begins and ends the piece and is heard three times in all, Section B being heard only as an intermediate contrast to it. In "Phantom Song" it is heard four times, being introduced three times by the Intro and followed by the Close. **That the portions in question are, in both pieces, the principal and most important sections of the music is significant in assessing the relationships between the two pieces.**

Appendix I

(2) *Rhythm and meter*

Music is a temporal art, an art of time. In music, time seems to be measured by notes and silences of different lengths, which determine the *basic rhythmic character* of a piece. The music's rhythmic character has to do with the relationship of slow notes to faster notes, and of the faster notes to still faster ones — all moving within a rate of speed termed *tempo*. In both "Till You" and "Phantom Song," the rhythmic relationships of such notes are entirely *duple* (or *binary*); that is, one slow note equals the unit of time occupied by two faster notes, and two of those faster notes equal the unit of time occupied by two still faster ones. Example 3 shows this identity between the two pieces graphically, in music notation. (Even if you cannot technically "read" this notation, you can see the relationships.)

Example 3. Rhythmic relationships between note-values in both "Till You" and "Phantom Song."



The tempo of "Till You" is not specified; that of "Phantom Song" is specified as "Allegro-vivace," both words meaning *fast*. The recordings of the two pieces make it clear, however, that both proceed at essentially the same tempo. Thus, **the basic rhythmic character of "Till You" and "Phantom Song" is identical.**

Appendix I

In music of the kind we are considering, time seems to be measured in another way also, relating to what is termed musical *meter*. The basic metrical character of a piece of music is determined by the grouping of basic, equal-length notes into a unit called a *measure*. In some music, the meter changes in the course of a piece; in both "Till You" and "Phantom Song," however, the meter is unchanging. Thus, **the basic metrical character of "Till You" and "Phantom Song" is identical.**

The *specific* metrical character of "Till You" and "Phantom Song" sounds identical to the ear. This seems to be belied by the musical notation of the two, but in fact it is not. The meter of such pieces as "Till You" and "Phantom Song " is indicated by a symbol or numbers at the beginning of the piece (the *meter signature* or *time signature*), and it is confirmed by vertical lines (*barlines*) indicating the beginning of each metrical unit (called a *measure*). The meter-signature of "Till You" is ¢; the meter-signature of "Phantom Song" is $\frac{4}{4}$. These are deceptively different. In reality, the metrical *effect* of both pieces is the same: both have the same four basic, equal-length notes (so-called quarter-notes) in each measure; both have primary accents on the note immediately following each barline (the *downbeat*) and secondary accents on the third quarter-note within each measure. Theoretically, pieces with the meter-signature ¢, that of "Till You," have two "beats" to the measure and those with the meter signature $\frac{4}{4}$, that of "Phantom Song", have four "beats" to the measure; realistically, in such music as this they are indistinguishable metricallly. Thus, although their meter-signatures are different, **the specific metrical character of "Till You" and "Phantom Song" is effectively identical.**

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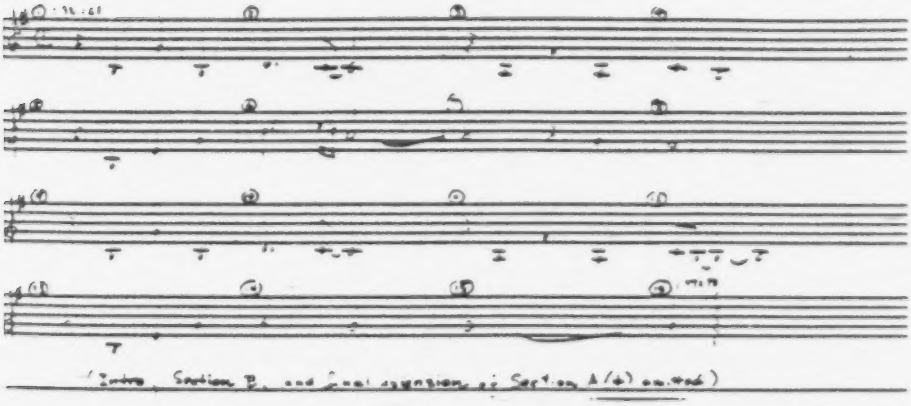
(3) *Melody*

Melody in music consists of a string of notes moving up and down in *pitch* and in different time-values, faster or slower, in *rhythm*, within the larger rhythmic and metrical shape of measures, each measure with its primarily and secondarily accented beats. The melody, or "tune," of "Till You" and "Phantom Song" is the voice part, the part of the music that seems to lie in the foreground of the musical expression and that primarily claims our attention.

Let us look closely at the melody of the portion in question of each piece, Section A. Example 4 shows the melody of Section A of "Till You":

Example 4. The melody of "Till You," Section A.

I have numbered the measures, showing that the melody is 16 measures long. In a complete performance of "Till You," Section A recurs 2 times following Section B, in measures 32-47 and in measures 63-78, which I show with the measure-numbers following those for measures 1 and 16.

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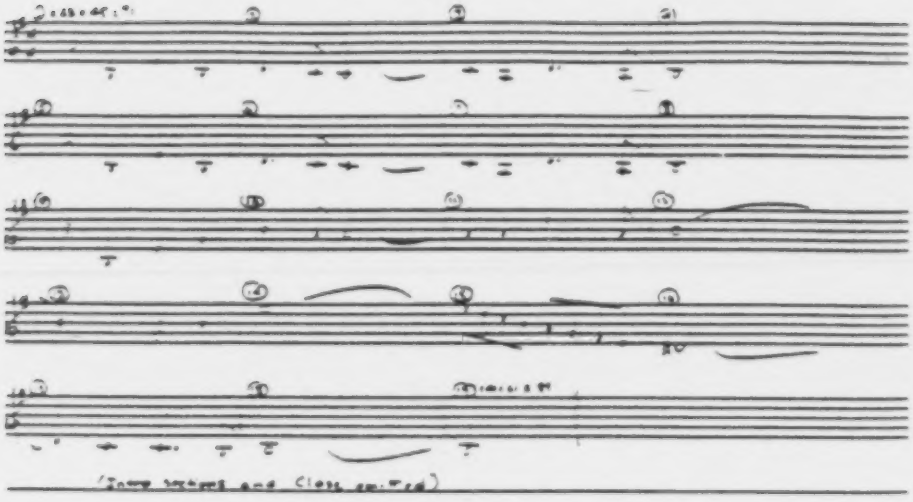
Example 5 shows the melody of Section A of "Phantom Song":

Example 5. The melody of "Phantom Song," Section A.



I have numbered the measures, showing that the melody is 19 measures long. In a complete performance of "Phantom Song," Section A recurs 3 times following recurrences of the Intro section, in measures 23-41, measures 45-61, and measures 71-89, which I show with the measure-numbers following those for measures 1 and 19.

The melodies of both "Till You" and "Phantom Song" are not of the same metrical length: "Till You" is 16 measures long, "Phantom Song" is 19. This difference turns out to be deceptive and insignificant. To understand why, we must understand that the individual notes of the melodies are shaped, and are heard, as groups of notes (called *phrases*), and often pairs of phrases seem to hang together and balance each other in larger structural shapes (called *periods*).

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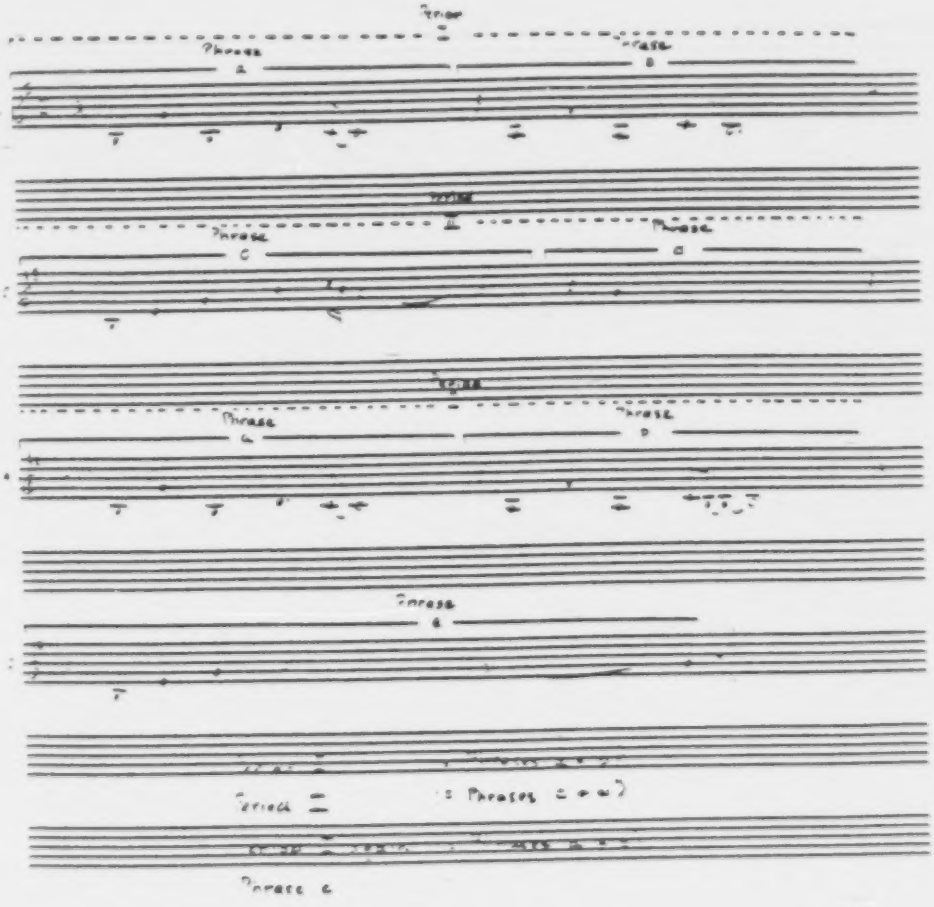
Let us analyze each of the melodies in terms of their *phrase-structure* and *period-structure*:

Example 6 shows the 16-measure-long melody of "Till You" (here, to reduce confusion I have indicated the numbers of the first and last measures of each line in the right and left margins).

Example 6. The melodic phrase- and period-structure of "Till You," Section A.

Appendix 1

As indicated by the brackets directly above each line, the melody is built up from 5 phrases (Phrases a, b, c, d, and e, Phrases a and b being repeated after Phrases c and d). And, as indicated by the dashed brackets, Phrases a and b work together as a period, and so do Phrases c and d. The melody has three periods (Period I being restated after Period II) plus the final Phrase e (as is outlined here and below the music in Example 6):

Period I	(= Phrases a + b)	[= 4 measures]
Period II	(= Phrases c + d)	[= 4 measures]
Period I again	(= Phrases a + b)	[= 4 measures]
Phrase e		[= 4 measures]

Example 7 shows the 19-measure-long melody of "Phantom Song" (its measure-numbers marked as in Example 6), with brackets showing its phrase-structure, and dashed brackets showing its period-structure.

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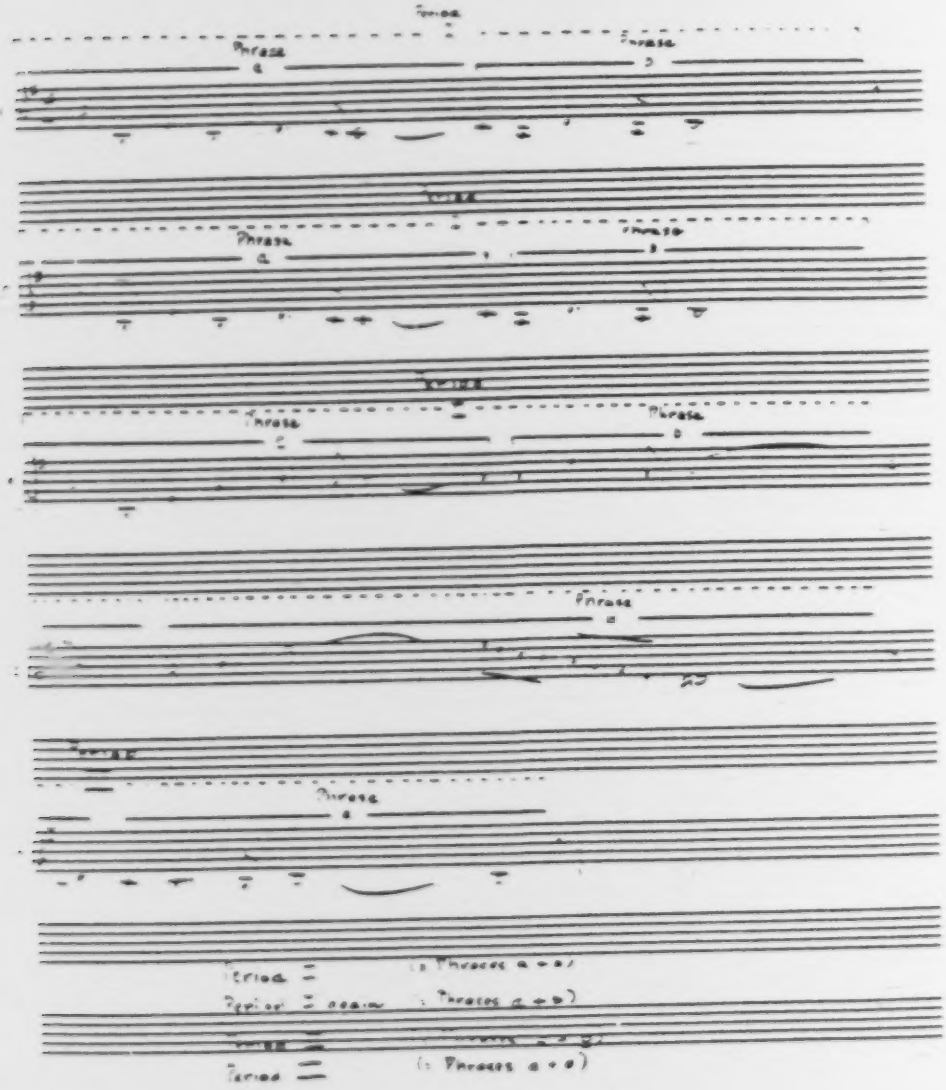
Example 7. The melodic phrase- and period-structure of "Phantom Song," Section A.

Appendix I

The melody of "Phantom Song" is built up from five phrases (Phrases a, b, c, d, and e), and each pair of phrases works together as a period. Note, though, that Period II "borrows" its 2nd phrase from Period I (Phrase b), though it is sung higher than before — I underline it in the outline given here and below the music in Example 7, which shows the phrase- and period-structure of the melody of "Phantom Song":

Period I	(= Phrases a + b)	[= 4 measures]
Period I again	(= Phrases a + b)	[= 4 measures]
Period II	(= Phrases c + *b*)	[= 5 measures]
Period III	(= Phrases d + e)	[= 6 measures]

There are striking similarities between Phrases a, b, and c in both melodies. These similarities are true of both the elements that go to make up melody: *pitch* and *rhythm*. For our analysis, it will be useful to distinguish between the *pitch* element of each melody and the *rhythm* element of each (even though in hearing a melody we don't make that distinction: we hear just a string of pitches moving in time). Let us zero in on the three phrases in "Till You" and "Phantom Song" that are strikingly similar — Phrases a, b, and c in each. Example 8 abstracts from the melodic phrases their *pitch* content (Ex. 8-a) and, separately, their *rhythmic* content (Ex. 8-b).

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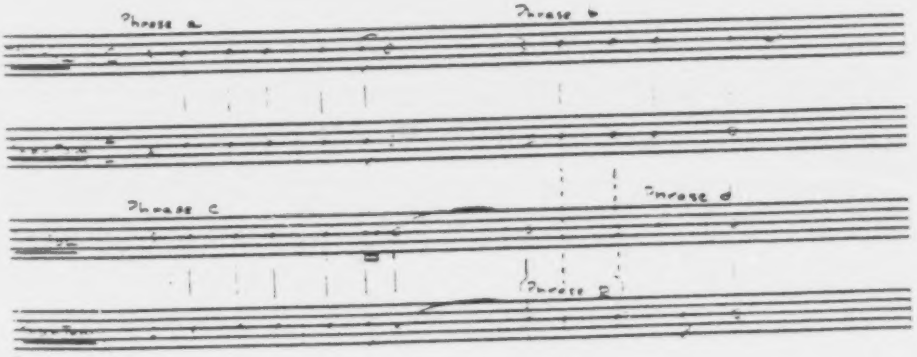
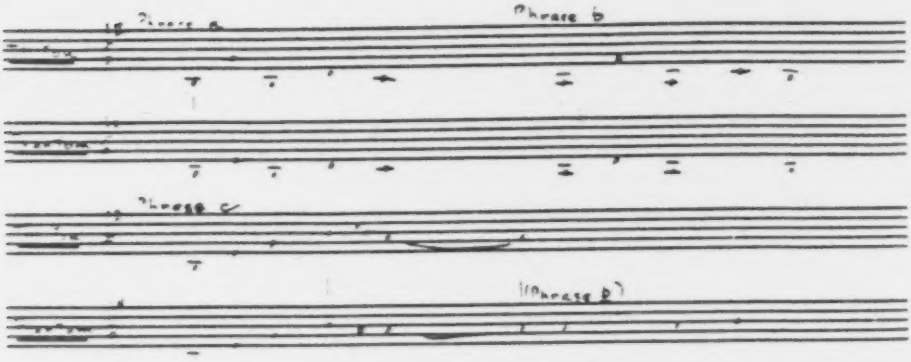
In Example 8-a, the vertical lines between notes of the "Till You" melody and those of the "Phantom Song" melody show correspondences in *pitch content* between Phrases a, b, and c; the dashed lines show the correspondences between Phrase b of "Till You" and Phrase *b* of "Phantom Song." In Phrase a, 4 of 5 notes are identical. In Phrase b, 3 of 5 are identical (and Phrase *b* of "Phantom Song" the same three correspond, though one octave higher). In Phrase c, 6 of 8 are identical.

In Example 8-b, similar vertical lines also show correspondences between the melodies of the two pieces's Phrases a, b, and c, this time in their *rhythm content*. In Phrase a, 5 of 6 are identical. In Phrase b, 4 of 5 are identical (and, as in pitch, Phrase *b* of "Phantom Song" shows correspondence with the rhythm of "Till You").

Example 8. The pitch and rhythmic content of Phrases a, b, and c of the melodies of "Till You" and "Phantom Song," viewed separately.

Example 8-a. The pitch content of the melodies.

Appendix I

Example 8-b. The rhythmic content of the melodies.

Let us now imagine the melody of both songs being performed at the same time — the melody of "Till You" being sung simultaneously with the melody of "Phantom Song." "Nesting" the melodic phrases of "Phantom Song" within those of "Till You," as I have done in Example 9, clarifies the relationships between the two.

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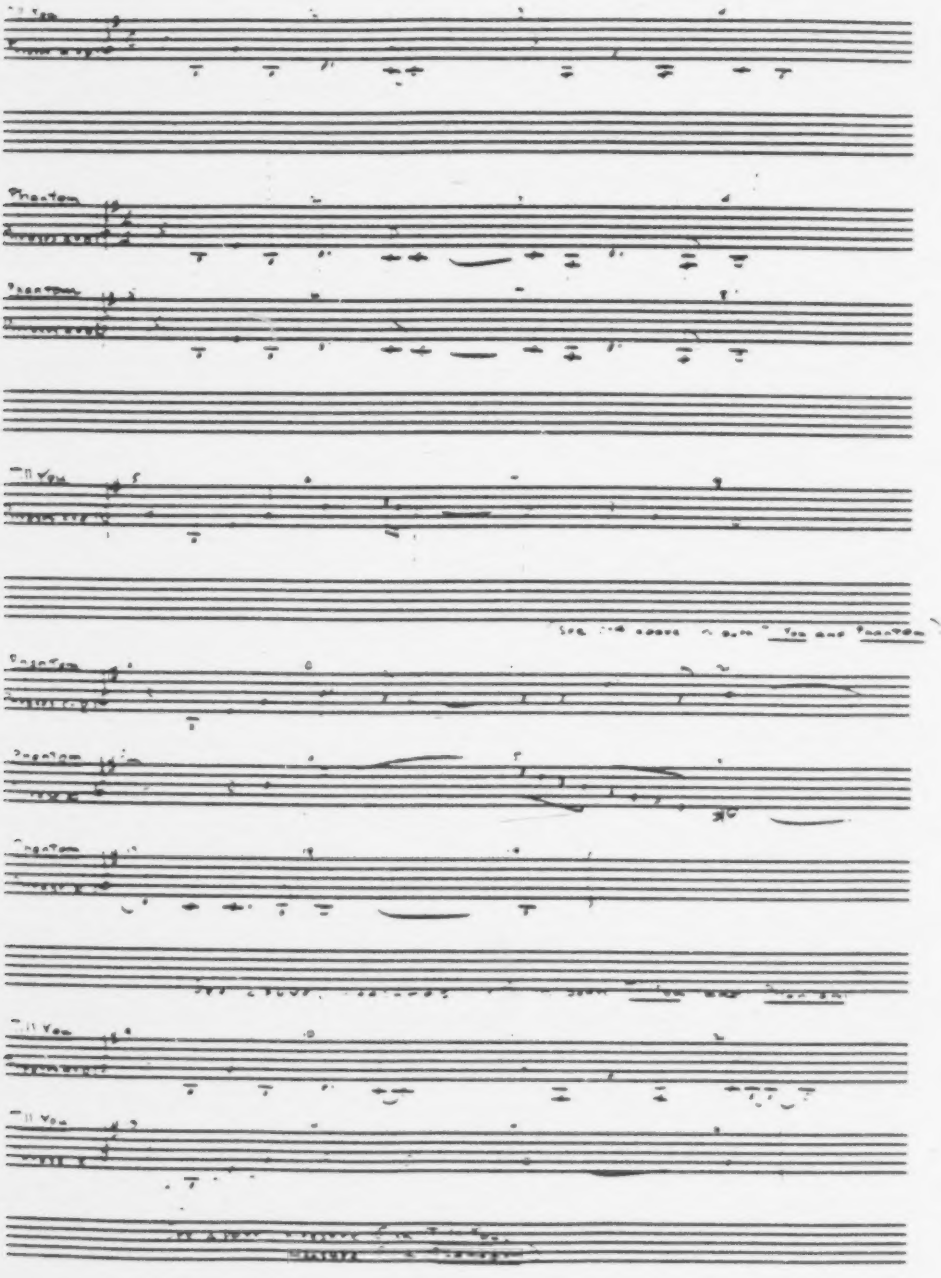
Example 9. The melody of "Till You" (Section A) together with the melody of "Phantom Song" Section A).

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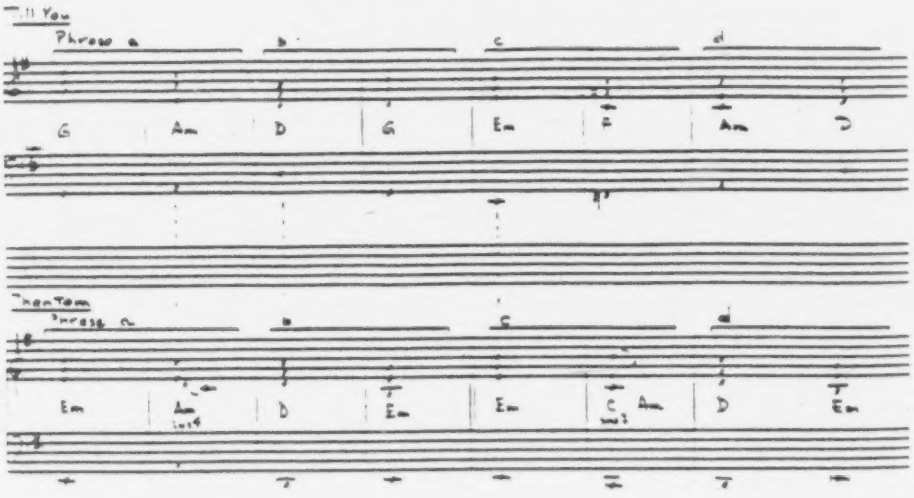
(4) *Harmony*

In both "Till You" and "Phantom Song", a constant element supporting the foreground melody and surrounding it with "color" is the accompaniment. It is an underpinning of *harmony* — a combination of notes sounding simultaneously that blend together to form *chords* that are related to — *rooted in* — a succession of prominent low notes, the *bass line*. In the published sheet music of both "Till You" and "Phantom Song," these chords are expressed in letters, in a sort of musical shorthand ("chord-symbols"), at the beginning of every measure (sometimes also in the middle of a measure). By taking these "chord-symbols" literally and translating them into chords over the bass line, we can produce the basic harmony of the music. For our purposes, we will concentrate on Phrases a, b, c, and d in both pieces, as shown in Example 10:

Example 10. The basic harmony of "Till You" (Phrases a-d) and "Phantom Song" (Phrases a-d), as indicated by chord symbols.

Appendix I

"Till You" and "Phantom Song" are less strikingly similar in harmony than in any other element we have analyzed. To the ear, the harmony of Phrases a, b, c, and d differs markedly in "Phantom Song" from that in "Till You." This arises from the fact that harmony — the choice of chords in a piece — is a function of *key* and *mode*, and "Till You" and "Phantom Song" are in different keys and modes. (In music such as this, "key" refers to the central note of a piece, to which all other notes are related; "mode" refers to the particular repertory of notes appropriate to that key.) "Till You" is in the key of G; its mode is major. "'Phantom Song" is in the key of E; its mode is minor. Example 10 shows this most clearly in Period I (Phrases a and b) of both pieces: in "Till You," Period I begins and ends with the indication "G" — shorthand for a "G major chord" that is to sound with the bass note G; in "Phantom Song," Period I begins and ends with the indication "Em" — shorthand for an "E minor chord" that is to sound with the bass note E.

Note, however, that in these two pairs of phrases, in both songs Phrase a ends on an "Am" chord and Phrase b begins on a "D" chord; in Example 10, I have indicated these correspondences with dashed lines. Another correspondence between the harmony of the two pieces is that Phrase c in both begins on an "Em" chord (also indicated with a dashed line). Still another connection between the two songs is that the keys of G-major and E-minor are closely related; technically, E-minor is called the "relative minor" of G major. Just how closely related they are can be suggested by replacing the E-minor chords supporting the melody of "Phantom Song" with *G-major* chords (as shown in Example 11); "Phantom Song" works well in G major — the very key and mode of "Till You" — and is perfectly recognizable as such:

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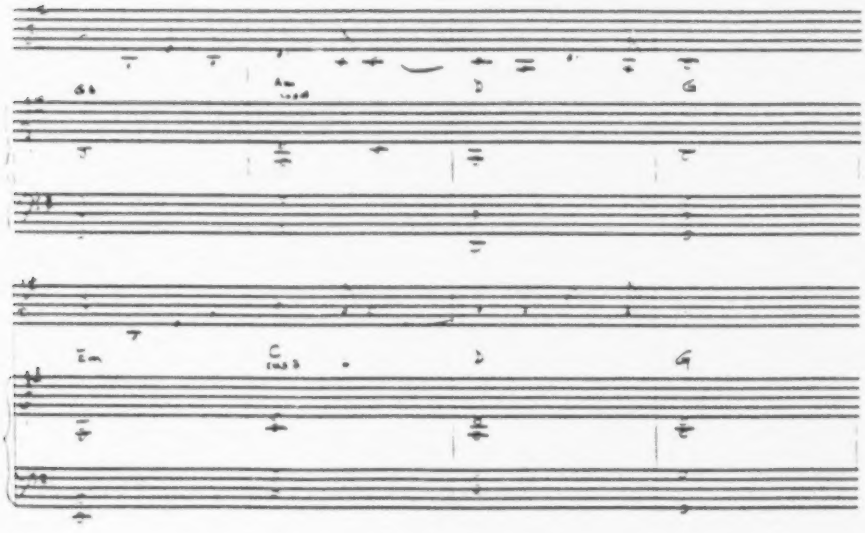
Example 11. "Phantom Song" (Periods 1 & 2) in G major.



Moreover, the *harmonic rhythm* — the rate at which the chords change, or the rhythmic pattern of such changes — is *identical* in both pieces, a fact of considerable significance in assessing the relationship between them. (Two pieces with very different harmonic rhythm can never be heard as significantly similar.)

Thus, **although the two pieces differ in harmony, key, and mode, they still reveal significant correspondences, and in harmonic rhythm an absolute identity.**

Appendix I

(5) *Interaction among elements*

Thus far I have analyzed and compared "Till You" and "Phantom Song" in terms of four basic musical elements — overall structure, rhythm, melody, and harmony — and dealt successively with each. I pointed to many ways in which one or another element as found in "Phantom Song" is strikingly similar, or even identical, to that element as found in "Till You." From time to time, however, I have suggested an interaction among these elements, and it is now time to stress how such interactions leave no doubt about the striking similarity of what I have called the "portions in question" of the two songs.

Overall structure, for example, has a rhythmic component — a rise and fall, if you will, in time. The two songs are similar in this: just as in "Till You" the most important structural section, Section A, alternates with the less important Section B, in "Phantom Song" the all-important Section A alternates with introductory material, finally giving way to a closing passage. And it is the music of Section A — the most important structural section — that contains the "portions in question."

In discussing matters of *rhythm* and *meter*, I pointed out strong similarities, even identities, between general and specific metrical and rhythm elements in the two songs. The "rhythm" of phrase and period structure in the Section A *melodies* is also overwhelmingly similar: it is a rhythm of paired phrases — periods — and of one period balanced by another in an identical rhythmic contour.

In discussing the element of *melody*, I pointed out that melody has aspects of rhythm as well as pitch, and we saw (in Examples 8-a and 8-b) how the rhythmic aspects of phrase after phrase of melody in Section A of "Till You" are echoed in those

of "Phantom Song." We have only to declaim rhythmically the texts of the two songs to sense their identity of melodic rhythm (I show the primary accents in each line, and also the critical "rest" [breath] on the strong downbeat of each melodic phrase):

("Till You"): [breath] My soul was émpty,
[breath] My body bróken,
[breath] My heart had nó-one
[breath] till yóu.

("Phantom"): [breath] In sleep he sáng to me,
[breath] In dreams he cáme.
[breath] That voice which cálls to me
[breath] and speaks my náme.

In discussing aspects of *harmony* (including key and mode), I pointed to similarities between "Till You" and "Phantom Song" as to position or placement of certain chords; this relates to rhythm— the temporal aspect of music. And I suggested that the principal *melody* of "Phantom Song" could be sung without difficulty to the *harmony* of "Till You" — showing thereby a remarkable interaction between the two.

In sum, my analysis of "Till You" and "Phantom Song" has demonstrated, in every musical element and in the interaction of musical elements, many significant similarities. The term "significant" is itself significant. One can find *coincidental* similarities all over the place in music. "Three Blind Mice" and "Swanee River" happen to begin with the same three notes. I would never argue, though, that Stephen Foster plagiarized in this instance: it is one of **insignificant coincidence**, not **significant similarity**. Between "Till You" and "Phantom Song," however, the similarities are so many, in so many areas,

over such an extraordinary proportion of the compositions, that I cannot consider them as insignificant or coincidental, and I must conclude that "Phantom Song" is based on "Till You."

PART II

Following is a discussion of the musical relationships between Andrew Lloyd Webber's "Close Every Door," a song from the musical *Joseph And the Amazing Technicolor Dream Coat*, and Ray Repp's song "Till You," both for voice and piano. My analysis is based on study and comparison of the sheet music of these songs; the music of "Close Every Door" is copyrighted 1969, 1978 ("all rights assigned [1989] to The Really Useful Group"), that of "Till You" 1978. I have also studied, through listening, sound recordings of both songs — "Till You" in the performance referred to in **PART I** above (see page 1), "Close Every Door" in a performance by male singer, female chorus, and instruments.

As in **PART I** above, my analysis and comparison are made in terms of the same four musical elements, which, for reasons that will emerge later, I will discuss in the following order:

(1) Overall structure

(2) Rhythm and meter

(3) Harmony

(4) Melody

And in a fifth section I will consider the interaction of these elements as they co-exist in the music as a whole.

Also as in **PART I** above, to compare meaningfully the two pieces, they both must be expressed in the same key; that is, at the same pitch level. Since the claim that "Till You" infringes

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"Close Every Door" relates to the claim that "Phantom Song" infringes "Till You," it will be helpful to express the music of all three songs in the same key level. In **PART I** above, I expressed "Phantom Song" in terms of the level of "Till You"; in order not to confuse matters, here in **PART II** the music of "Close Every Door" will also be expressed at that level, one semi-tone lower than the published sheet music (from F to E). I have made this transposition in any examples of music from "Close Every Door" that are given and discussed below. (Music examples from "Till You" are at its original pitch level.)

(1) *Overall structure*

Like the structure of both "Till You" and "Phantom Song," that of "Close Every Door" is based on two different musical sections (call them Section A and Section B), heard in alternation, after a very brief introduction (call it Intro) consisting only of a few chords. Compared to "Till You" or "Phantom Song," "Close Every Door" vastly expands this basic two-section idea by repetition of the sections in a lengthy, irregular, unpredictable order of alternation. The sectional structure of the entire piece, in both the sheet music and the sound recording, is shown in Example 12; what we might call the three "super-sections" [numbered in brackets] are heard successively, and should be read the same way:

Appendix 1

Example 12. The sectional structure of "Close Every Door."

[1]	Intro	A	A	B	A	B		
	(instr'l)							
[2]		A		A		B		
		(instr'l)		("la la")		(instr'l)		
[3]				A	A	B	A	B
						(+ cho)	(+ cho)	

After the brief Intro, the male singer sings five sections (A A B A B). The next three sections (the same music, in A A B order) vary the sound: the male singer drops out, instruments alone play the 1st Section A and the Section B, and in the second Section A (played again by the instruments) a female chorus sings over them repeated notes to the syllables "la la la." The male singer has three more sections (in A A B order), and then for the last two (in A B order) he is joined by the chorus, now singing the words with him.

Each of the two musical sections of "Close Every Door" has four phrases, the first always repeated. This internal phrase structure may be expressed as in Example 13:

Example 13. The internal phrase-structure of Sections A and B of "Close Every Door."

Section A	*Section B*
a a b c	d d' e f

Appendix 1

(In Section B, the 2nd Phrase d is sung at a lower pitch level than the first Phrase d; this *variant* of the phrase is indicated by the apostrophe following the d. There are occasional insignificant variants of Phrases c, e, and f as well, not shown here.)

The complete sectional and phrase strcture of the piece may be expressed as in Example 14:

Example 14. The complete sectional and phrase structure of "Close Every Door."

[1]	Intro	A	A	B	A	B
	(instr'l)	aabc	aabc'	dd'ef	aabc'	dd'e'f'

[2]	A	A	B
	(instr'l)	("la la")	(instr'l)
	aabc	aabc'	dd'ef

[3]	A	A	B	A	B
				(+ cho)	(+ cho)
	aabc	aabc'	dd'ef	aabc'	dd'ef'

The structural *principle* of "Close Every Door" — that of two contrasting musical sections, heard in alternation — is the same as that of "Till You." (It is also, however, the same as that of "Phantom Song" and, indeed, of the overwhelming majority of popular songs.) It should be obvious, however — comparing the three songs by ear, or by the diagrams of my Examples 1, 2, 6, 7, 13, and 14 — that the working-out of that principle differs in each of the three songs. **The overall structural *details* of "Till You" differ markedly from, and bear little relationship to, those of "Close Evory Door"; in structure, the two pieces are far from similar.**

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(2) *Rhythm and meter*

In both "Till You" and "Close Every Door," the rhythmic relationships of slower notes to faster ones, and of the faster ones to still faster ones, are entirely *duple* (or *binary*); that is, one slow note equals the unit of time occupied by two faster notes, and two of those faster notes equal the unit of time occupied by two still faster ones. Example 3 above showed this identity between "Phantom Song" and "Till You" graphically, in music notation; the same example is valid as an illustration of the rhythmic relationships between note-values in "Close Every Door" as well (see Example 3 above). Thus, **the basic rhythmic character of "Till You" and "Close Every Door" is identical.**

However, in one fundamental rhythmic respect — their meter — the two songs are anything but identical. "Till You," as explained earlier (p. 7) is in ¢ meter, in which every measure has four basic quarter-note "beats," with the first and third of these being accented. "Close Every Door," on the other hand, is in *triple* meter, with the meter- or time-signature $\frac{3}{4}$, and with *three* such basic quarter-notes in every measure. (The two songs are metrically as different, and in exactly the same way, as "The Surrey with the Fringe on Top" and "Oh, What a Beautiful Morning" in *Oklahoma!*) Thus, **the basic *metrical* character of "Till You" and "Close Every Door" is not identical — indeed, it is antithetical.**

(3) Harmony

As in my earlier discussion of harmony (when comparing "Till You" and "Phantom Song"), here too we must consider various matters besides just the *chords* (the "harmonies"

themselves); these other matters are *key*, *mode*, and *harmonic rhythm*.

"Close Every Door" and "Till You" are in different keys and modes. "Close Every Door" is (as transposed in this discussion, for comparison with the other songs) in the key of E and its mode is minor. "Till You" is in the key of G and its mode is major. Thus, **in both key and mode "Close Every Door" and "Till You" are fundamentally dissimilar.**

The harmonic rhythm of both songs is the same: chords change with every measure or, to put it the other way, there is one chord per measure. Thus, **in harmonic rhythm "Close Every Door" and "Till You" are equivalent.**

In harmony per se — i.e., in the repertory and the sequence of chords used — "Close Every Door" and "Till You" differ markedly. Example 15 shows, by letter-names, the harmony of each song. Since each has two sections (A and B) of exactly equivalent length — 8 measures — we can superimpose the harmony of "Close Every Door," measure for measure, over that of "Till You":

Appendix 1

Example 15. The harmony of "Close Every Door" and "Till You"

Section A (measure nos.):	1	2	3	4	5	6	7	8
"Close Every Door":	Em	Bb9	Em	Bb9	Em	C	Am	Bb9
"Till You":	G	Am	D	G	Em	F	Am	D

Section B (measure nos.):	1	2	3	4	5	6	7	8
"Close Every Door":	G7	C	D	G	F7	Em	C	B
"Till You":	G	Am	D	G	G	Am	D	G

(In this system of letter-notation, a capital letter alone = a major chord based on that note; a capital letter followed by "m" = a minor chord based on the note; a capital letter followed by "b9" = a minor-ninth chord based on the note; a capital letter followed by a "7" = a minor-seventh chord based on the note.)

It is important to recognize that, although the two songs share some harmonic repertory (chords of Am, D, Em, and G occur in both), the *harmonic function* of these chords differs in the two songs, since they are in different keys and modes — the chords *sound differently* in each. Moreover, the sequence of chords is totally different in the two songs; no one could possibly claim that one of the songs derives from the other harmonically. Thus, **"Close Every Door" and "Till You" are fundamentally unrelated in harmony (as also in key and mode).**

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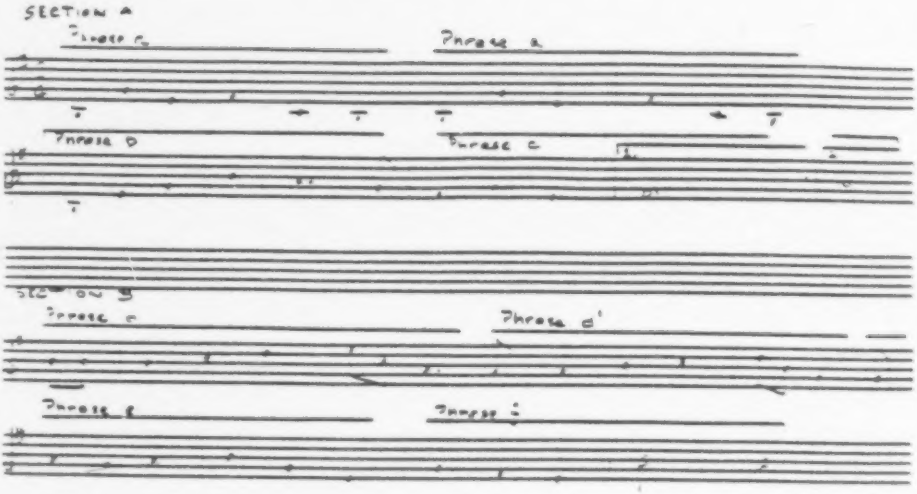
(4) *Melody*

My earlier discussion of the *phrase-structure* of "Close Every Door" (illustrated by Examples 13 and 14 above) applies very specifically to *melody* in the song. The melodic/harmonic phrases, within the triple-meter rhythmic basis, are what define that phrase-structure: each melodic/harmonic phrase is four measures long, unremittingly, throughout the song. This is not quite true of "Till You" — its Phrase e is elided with the beginning of its Phrase f, thus one or the other of those phrases must be counted as having only *three*, not four, measures — though basically "Till You," too, is conceived in four-measure phrases (as, of course, are the overwhelming majority of popular songs of this type). However — a very important "however" — the two melodies are very different in the relationship *between* those four-measure melodic phrases. In 'Till You," as we have seen (see Example 6 above), the melodic phrases are paired, and each paired phrase is heard as half of the larger melodic unit termed a *period*, each period containing two balanced phrases. This is not true of "Close Every Door," the melodic phrases of which are independent: in Section A, we hear four unpaired phrases (a, a, b, c); in Section B, we hear the same thing (phrases d, d', e, and f), as shown in Example 16:

Appendix I

Example 16. The unpaired melodic phrases of "Close Every Door."



Thus, **"Till You" and "Close Every Door" are fundamentally different in their melodic phrase-structure.**

It is alleged, in the amended answer and counterclaim of Andrew Lloyd Webber signed by Jane G. Stevens and dated 27 June 1991 (§55, p. 13), that "Till You" is "substantially similar" to "Close Every Door," and, in a notice of motion of the same date also signed by Jane G. Stevens, it is also alleged (§13, p. 5) that "certain musical intervals embodied in plaintiffs' purported work 'Till You' are substantially similar to and infringe upon certain musical intervals in 'Close Every Door'." These are vague allegations, but I hazard the guess that they both

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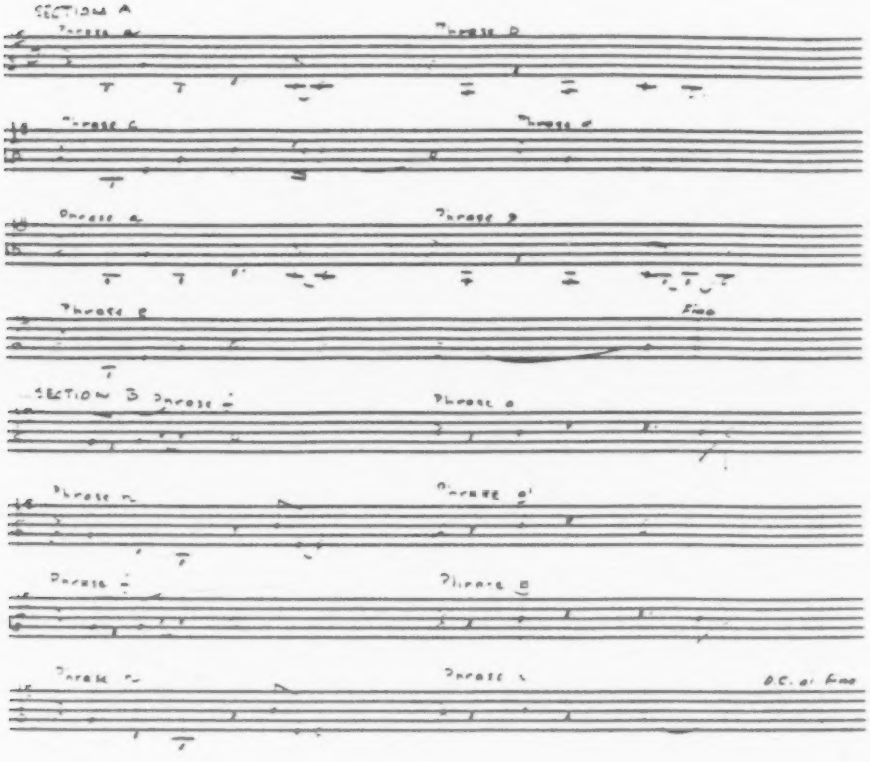
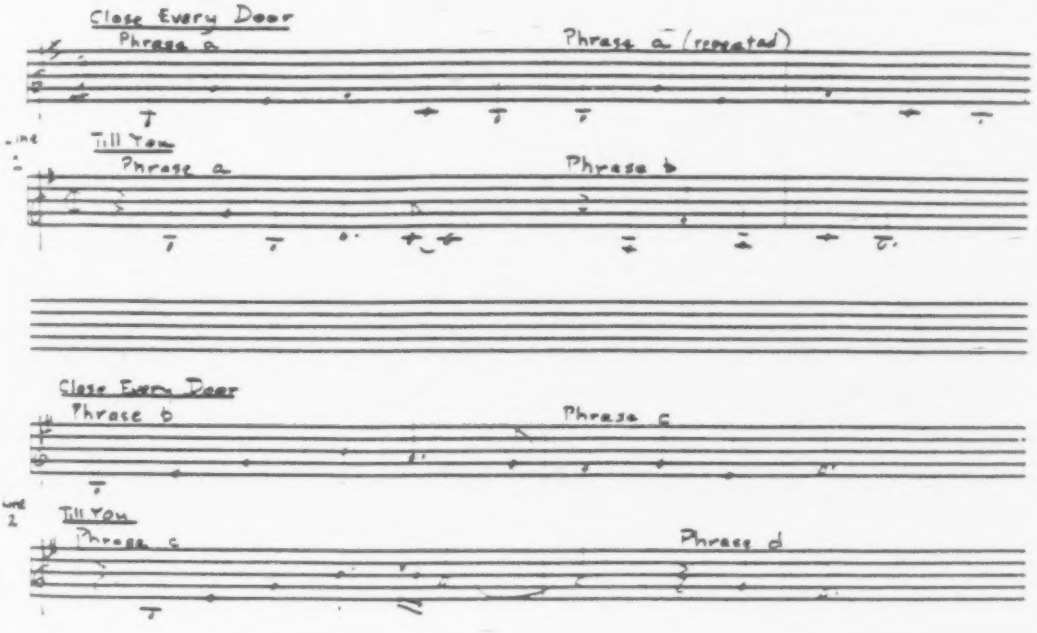
refer to certain *melodic* intervals in the voice parts of the two songs. Therefore, let me proceed to an analysis of the *intervallic structure* of the melodies of the two songs.

Example 16 above showed the basic melodic content (Sections A and B) of "Close Every Door" (omitted are the four harmonic chords of the brief introduction [three only in the recording made available to me] and the repetitious "la la la" of the unison female chorus sung along with an instrumental section in "super-section" [2]). Example 17 shows the entire melody (Section A and Section B) of "Till You":

Example 17. The entire melody of "Till You" (Sections A & B).

Appendix I

Comparing "Close Every Door" with "Till You" phrase by melodic phrase, there are only two passages in each that have any "intervallic" similarity whatever: (1) Phrases a and a (repeated) of "Close Every Door" and Phrases a and b of "Till You," and (2) Phrases b and c of "Close Every Door" and Phrases c and d of "Till You." In Example 18, these passages are laid out, measure by measure, one above the other.

Example 18. Phrases a-a and b-c of "Close Every Door" superimposed on Phrases a-b and c-d of "Till You."



Appendix I –

Before zeroing in on these two pairs of phrases, it is important to underline some all-important general, over-riding facts: **(1) the two songs are in completely different meters ($\frac{3}{4}$ vs. $\frac{4}{4}$), which means that the pattern of accentuation will differ markedly in the two songs; and (2) they are in completely different keys and modes, which means that the *function* of each pitch (its relationship to all the other pitches used in the song, and its relation to the usual harmonies associated with the key and mode of each song) will differ in the two songs — each pitch *sounds different* in one song than it does in the other.**

The first two phrases of the two songs (Line 1 in Example 18) *are similar* in these ways:

(1) Their melodic contour — the general directions up or down of the melodic line — is similar (specifically, in each phrase the melodic line goes: up-down-up-down).

(2) The first two notes in the first phrase (but not the second phrase) of each are the same (B up to G).

(3) The last two notes of the second phrase of each are the same (B).

These two phrases *differ* in more significant ways:

(1) Although their melodic *contour* is similar, the actual pitches of the melodies are distinctly different.

(2) Although the first two notes of the first phrase of each are the same in pitch, *rhythmically* they are

different: in "Close Every Door" the B is a "strong" beat, the G a "weak" beat, while in "Till You" the B is a weak beat (sounding after a "rest" — silence — on the strong downbeat), the G a strong beat. (Speaking the text may help to make clear the distinction: "Clóse every . . ." vs. "[bréath] My sóul . . .").

(3) Although the last two notes of the second phrase of each are the same in pitch, they are completely different *rhythmically*. The C-B in "Close Every Door" are unaccented quarter-notes on the two weak beats of the measure (the 2nd and 3rd beats); the C of "Till You" is on the strong first beat, the downbeat, of the measure, and the B is three times as long as the B of "Close Every Door" (the former being a dotted-half-note and appearing early in the measure).

Thus, **comparison of the first two phrases of the two songs reveals insignificant "intervallic" similarities but significant differences, arising from context, that confirm the independence here of "Till You" from "Close Every Door."**

The second two phrases of the two songs (Line 2 in Example 18) *are similar* in these ways:

(1) The first four notes of the first phrase of each (B-E-G-B) are the same in pitch, and one could even claim that the first five significant notes (B-E-G-B-A) are the same in pitch, the C-B between the last B-A in "Till You" 's phrase being ornamental, merely decorative.

(2) The last note of the second phrase of each is the same (F-sharp).

The two phrases *differ* in these ways:

(1) Although the first four notes (or five) of each are the same in pitch, *metrically* (hence *accentually*) they are different: the low B in "Close Every Door" is a strongly accented downbeat followed by the weakly accented E and G prior to a second strongly accented higher B, whereas the B-E-G in "Till You" is heard as a weakly accented "pickup" to the strongly accented higher B; the higher B in "Close Every Door" rushes on to a syncopated, accented A, whereas the higher B in "Till You" is dwelt upon before falling to the normally accented A. In context, the series of notes *sound different.*

(2) Although the last note of the second phrase of each is the same (both in pitch and rhythm), in context it too will *sound* different: in "Close Every Door" it is the 2nd degree of the E-minor scale and is harmonized with a Bb9 chord; in "Till You" it is the 7th note of the G-major scale and is harmonized with a D chord. This harmonic context, in which we hear each of these Bs, makes them sound unlike each other.

Thus, **comparison of the second two phrases of the two songs again reveals insignificant "intervallic" similarities but significant differences, arising from the context, that confirm the independence here of "Till You" from "Close Every Door."**

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(5) *Interaction among elements*

Much of the above discussion (**Part II,** §1-4) has already touched on the interaction among the various musical elements that enter into the songs "Close Every Door" and "Till You" as musical wholes. More than once, the contextual surrounding of one element by others was seen to give that element a particularity distinguishing it from an apparently similar element in a different context. Here perhaps it is sufficient to reiterate the significance (not to say the paramount importance) — in comparing passages of music, or whole pieces of music, to each other — of *contextual awareness*, and of avoiding a simplistic isolation of one musical element from the others with which it appears, and with which it is *heard.*

Having said that, I would add that by diligently searching the entire music of "Close Every Door" and "Till You" I unearthed only two passages that could conceivably be claimed as similar. In the contexts of the entire songs, these are not particularly important passages and, statistically, make up only a small percentage of the songs as entities. Moreover, the "intervallic" content of even these passages is not definitive of either song, being — when viewed in isolation, separate from context and from the entire musical compositions — part of the common vernacular of later 20th-century popular music.

PART III

I have studied the sheet music of Webber's "Heaven on Their Minds" (hereafter "Heaven") for voice and keyboard (copyright 1970) and also, through listening, an unidentified sound recording for male voice and instruments. I have compared "Heaven" with "Till You," after making the necessary

transposition of "Heaven" (up a whole-tone, from D minor to E minor) to the key level of "Till You." **Aside from the facts that both songs are in 4/4 meter (though "Heaven" has a "rock" beat foreign to "Till You") and are in the minor mode, I find no significant similarity whatever between the two songs, or passages within them, in any musical element — structure, melody, rhythm, harmony — or in interaction among elements.**

I have also studied the sheet music of Webber's "Benjamin Calypso" for voice and keyboard (copyright 1975, 1978) and also, through listening, an unidentified sound recording for male voice, vocal group, and instruments. I have compared "Benjamin Calypso" with "Till You," after making the necessary transposition of "Benjamin Calypso" (down a semi-tone, from F to E) to the key level of "Till You." **Aside from the fact that both songs are in 4/4 meter (though "Benjamin Calypso" has consistent calypso rhythms that are foreign to "Till You"), I find no significant similarity whatever between the two songs, or any passages within them, in any musical element — structure, melody, rhythm, harmony — or in interaction among elements.**

As mentioned earlier, another song by Webber introduced into the case by him, "Food of Love," was not available for my study and comparison with "Till You."

s/ H. Wiley Hitchcock

H. Wiley Hitchcock
New York City
10 April 1993

APPENDIX J — REPLY AFFIDAVIT OF LAWRENCE FERRARA DATED NOVEMBER 2, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0906 (SWK)

RAY REPP and K & R MUSIC, INC.,

Plaintiffs,

v.

ANDREW LLOYD WEBBER; THE REALLY USEFUL GROUP, PLC; THE REALLY USEFUL COMPANY, INC.; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INC.; AND DOES 1-10,

Defendants.

REPLY AFFIDAVIT OF LAWRENCE FERRARA

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAWRENCE FERRARA, being duly sworn, deposes and says that:

1. I have reviewed the opposition of plaintiffs to defendants' motion for summary judgment in its entirety. I submit this reply affidavit to reaffirm my analyses, findings and conclusions discussed in detail in my affidavit submitted

in support of defendants' summary judgment motion, sworn to June 17, 1993 ("Ferrara Aff.").

2. I also submit this reply affidavit to confirm that plaintiffs' experts, Profs. Wiley Hitchcock and James Mack, have failed, both in their expert report and in their affidavits submitted in opposition to defendants' motion, to offer *any* rebuttal analysis to my comparative music analysis of the Phantom Song and the four earlier Lloyd Webber compositions from which I have concluded the Phantom Song is derived. In fact, both experts remain completely silent on the subject of whether the melodic phrases at issue in the Phantom Song are derived from these earlier Lloyd Webber works. Significantly then, neither of plaintiffs' experts has challenged my conclusion, upon which defendants' summary judgment motion is based, that the two melodic phrases at issue in the Phantom Song are derived from Lloyd Webber's earlier works.[1]

3. Similarly, neither of plaintiffs' experts discusses nor renders any opinion on my extant literature analysis and conclusion that one of the two melodic phrases in issue in this case is found in public domain extant literature and is not protectible as copyrighted material.

4. Finally, I submit this reply affidavit to respond to plaintiffs' experts' *only* statements concerning my music analyses and findings, located in a single, conclusory paragraph in Wiley Hitchcock's affidavit. *See* Declaration of Prof. Wiley Hitchcock, dated September 7, 1993, ¶10, Ex. 4 to Plaintiffs' Response

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1. Contrary to plaintiffs' counsel's contention, neither of plaintiffs' experts has opined that the Phantom Song is not based upon the four earlier Lloyd Webber compositions.

("Hitchcock Aff."). Prof. Hitchcock contends that the analysis which I employed to reach my conclusions is "flawed" and "pseudo-statistical". Prof. Hitchcock does not provide any empirical support for his blanket, conclusory statements, and for that reason alone they should carry no weight.

5. Plaintiffs' counsel, William Coulson, Esq., extrapolates beyond the conclusory statements made by Prof. Hitchcock and purports to find specific methodological errors in my music analysis. *See* Plaintiffs' Response pp. 42-56. There is nothing in the record indicating that Mr. Coulson is qualified as an expert in music analysis or theory and I am advised that his statements do not constitute evidence to contradict my analyses. In any event, as discussed below, Mr. Coulson's statements, and Prof. Hitchcock's conclusory contentions, are not only baseless and unsupported, but are contradicted by statements made and analyses conducted in plaintiffs' own expert report submitted as Exhibit 4 to Plaintiffs' Response.

Summary and Reaffirmation of My Findings and Conclusions In Support of Defendants' Summary Judgment Motion

6. There are two specific and identifiable melodic phrases of the Phantom Song at issue in this case, which I have termed Phrases One and Two. *See* ¶ 26 of the Ferrara Affidavit. Plaintiffs do not dispute that these phrases are the portions of the Phantom Song at issue, as plaintiffs nowhere claim that there is any additional music of the Phantom Song that infringes "Till You".

7. Phrase One of the Phantom Song (identified at Ferrara Aff. ¶ 22, Musical Ex. 3) which allegedly infringes Phrase One of "Till You" (identified at Ferrara Aff. ¶ 19, Musical Ex. 1) is

directly traceable to Lloyd Webber's compositions "Benjamin Calypso" (copyright 1975) and "Pilate's Dream" (copyright 1970) which pre-date Repp's "Till You". *See* Ferrara Aff., ¶¶ 31-40, Musical Exs. 8-11 and Audio Tape Exs. 1, 3, 4. Again, plaintiffs' experts do not dispute or even address this finding.

8. The melodic phrase in Phrase One in the Phantom Song is also found in five compositions in the public domain.[2] Ferrara Aff. ¶¶ 53-55, Musical Ex. 17, Audio Tape Ex. 9. Again, neither of plaintiffs' experts make a single reference or statement in either their expert report or their affidavits concerning my analyses and findings regarding the significance of this extant literature. Thus, they wholly fail to rebut my findings and conclusions concerning the existence of public domain works with identical melodic pitch contents to Phrase One of the Phantom Song.

9. Phrase Two of the Phantom Song (identified at Ferrara Aff. ¶ 23, Musical Ex. 4), which allegedly infringes Phrase Two of "Till You" (identified at Ferrara Aff. ¶ 20, Musical Ex. 2) is derived from two of Lloyd Webber's works which pre-date "Till You", namely "Close Every Door" (copyright 1969) and "Heaven On Their Minds (copyright 1970). *See* Ferrara Aff. ¶¶ 41-46, Musical Exs. 12-14, and Audio Tape Ex. 5. Moreover,

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2. Plaintiffs' counsel does not believe that five public domain examples is sufficient to demonstrate the commonplace nature of the melodic phrase in Phrase One. Plaintiffs' Response at 51. As set forth on Exhibit C to Defendants Supplemental Expert Interrogatory Answers, there are in fact *21* examples of published works of composers which have similar melodic phrases to Phrase One; five of these 21 works are in the public domain and have identical melodic pitch contents to the melody in Phrase One of the Phantom Song.

the *entire* seven-note theme of Phrase Two of "Till You" exists in melodic pitch content identically in "Close Every Door". Only five of "Close Every Door's" seven notes exist in Phrase Two of the Phantom Song. *See* Ferrara Aff. ¶¶ 47-49, Musical Ex. 15, Audio Tape Ex. 7.

10. Although Professor Hitchcock does disclaim "Till You's" similarities to "Close Every Door" in his expert report, he does not dispute (or even address) my conclusion that Phrase Two of the Phantom Song is derived from "Close Every Door". Prof. Hitchcock thus fails to rebut my significant findings that Phrase Two of the Phantom Song uses identical melodic pitches, almost identical rhythm, and identical harmony to the phrase in "Close Every Door", but that the harmony in the Phantom Song is not identical to the harmony in Phrase Two of "Till You". *See* Ferrara Aff. ¶¶ 41, 42, 48.

11. Contrary to plaintiffs' counsel's contention (Plaintiffs' Response at 3, 43), I did not concede nor do I find the music at issue in Repp's "Till You" to be unique.

12. I here fully reaffirm and stand behind my conclusions and findings as set forth in the Ferrara Affidavit, which are summarized above. In addition, I again expressly adopt herein the analyses and statements made by Dr. Jonathan Kramer in his affidavit, sworn to June 17, 1993, which I understand was previously filed as part of defendants' summary judgment motion. I had previously incorporated and adopted his statements and findings in defendants' supplemental expert interrogatory answers.

Appendix J

Plaintiffs' Experts' Sole Conclusory Contention That My Analysis Is Flawed Is Baseless And Is Contradicted By His Own Report

13. The only statement by either of plaintiffs' experts concerning my music analyses is found at ¶ 10 of Prof. Hitchcock's affidavit in opposition to defendants' motion. He states as follows:

> "[Dr. Ferrara's] analysis is flawed . . . . Prof. Ferrara relies on specious pseudo statistical presentation — musical note-counting and percentage-taking — and his analyses depend in part on his taking out of context the phrases in question, in part on separating the musical *pitches* of notes from other significant components of the musical experience, and treating those pitches exclusively."

Hitchcock Aff., ¶ 10 (emphasis in original).

14. What Prof. Hitchcock does *not* say is that *any* of my *conclusions* are wrong. What Prof. Hitchcock does *not* dispute is that the music at issue in the Phantom Song is derived from the music which I have isolated in Lloyd Webber's earlier works and which pre-date Repp's "Till You". Significantly, Prof. Hitchcock does *not* say that I have incorrectly described *any* music in any of my musical examples to my affidavit or incorrectly played any music on my audio tapes. All that Prof. Hitchcock does claim without providing any support for his contention, is that it is somehow a "flawed" approach in comparing music to look carefully at the specific melodic pitches in question to see whether those melodic pitches are the same in the two songs.

Appendix J

15. Since Prof. Hitchcock is unable to say that I have not found these melodies in Lloyd Webber's earlier works or that I have described them incorrectly, he blanketly contends that I cannot isolate these melodic pitches from other musical element and that I have overlooked all of the other musical elements of the musical phrases which I have analyzed.

16. Contrary to Prof. Hitchcock's contention, I have not ignored the other musical elements of the phrases which I have analyzed, as my full report, Ex. 1 hereto, reflects. *See* also Ferrara Aff., ¶¶ 32-33, 37, 40, 42, and 46. In my report, I discuss in detail the various musical elements of the relevant passages in the earlier Lloyd Webber works, including harmony, rhythm and melody, and compare all of these musical elements. Those comparisons in no way alter the conclusions or findings which I have made in the Ferrara Affidavit and which I reaffirm herein. Rather, those comparisons *bolster* my conclusion that the Phantom Song's phrases at issue are derived from Lloyd Webber's earlier works. *See* Ferrara Report page 48-49. On Audio Tape Exs. 1 and 2 accompanying this reply affidavit, I play the melodies (as I did in my first submission), followed by the full published piano arrangements[3], of Phrases One and Two of the Phantom Song and the relevant passages of two earlier Lloyd Webber works from which they are respectively derived, to demonstrate that one can still readily discern the derivation of the music when all of the musical elements are combined.

17. Although I have taken into consideration all of the musical elements of the relevant music which I have analyzed, Prof. Hitchcock's contention — that it is improper to compare

3. The piano examples of the music of all of the songs on the audio tape examples hereto are transposed to be played in the same key.

melodic pitches of two songs in isolation from the other musical elements (*i.e.*, harmony and rhythm) — is wrong and is contradicted by his own report. Prof. Hitchcock "isolates" musical elements and "note-counts" throughout his own 49 page report.

18. For example, on page 2 of his report, Prof. Hitchcock states that "In order to discuss the musical relationships between one piece and another . . . one *must* first analyze these elements *separately* . . . ." Hitchcock Report p. 2 (emphasis added) In examples 8-a and 8-b at page 6 of the Musical Examples in his report, and in the concurrent discussion on page 12 of his report, Prof. Hitchcock isolates melodic pitch (Ex. 8-a) and rhythm (Ex. 8-b). Hitchcock Report Ex. 8a and 8b.

19. Prof. Hitchcock's conclusory contention that "note-counting" is "specious" and "pseudo statistical" is also contradicted by his own report. On page 12 of his report, Prof. Hitchcock *note-counts* the *isolated* element of melodic pitch: "In Phrase a, 4 of 5 notes are identical. In Phrase b, 3 of 5 are identical . . . . In Phrase c, 6 of 8 are identical." Hitchcock Report, p. 12. He then separately *note-counts* the *isolated* element of rhythm: "In Phrase a, 5 of 6 are identical. In Phrase b, 4 of 5 are identical." *Id.*

20. Thus, Prof. Hitchcock in his report does *exactly* what he has now sworn to in condemning my methodology as "flawed". He isolates two musical elements — pitch and rhythm — and then counts the number of common notes in each song by reference to whether they have identity of first pitch and then rhythm. Prof. Hitchcock then draws conclusions as to the similarities of the music based upon his note-counting of isolated elements. Clearly, this method of analysis, which plaintiffs now

claim is improper, would not have been employed by Prof. Hitchcock in his report if plaintiffs' allegations were true.

21. Prof. Hitchcock's contention in ¶ 10 of his affidavit that I take "out of context the phrases in question" is incorrect. I have merely *isolated* the phrases in question in "Till You" and the Phantom Song[4], and then located and isolated musical phrases in Lloyd Webber's earlier works and the extant literature which I compare to Phrases One and Two of the Phantom Song in my affidavit in support of defendants' motion. Prof. Hitchcock's sworn affidavit is again contradicted by his own statement in his report that one must "*isolate the portions in question.*" Hitchcock Rept. p. 2. (emphasis in original in part.)

22. If anyone has rendered an opinion out of "context", it is Prof. Hitchcock. It is incomprehensible that any conclusion could be drawn by Prof. Hitchcock in his report that "Phantom Song is based on 'Till You' " (Hitchcock Report p. 18) without any consideration of the comparisons of the Phantom Song to Lloyd Webber's pre-1978 works and the extant literature.[5]

Plaintiffs' Counsel's Allegations Concerning My Analysis Are Meritless

23. One of plaintiffs' *counsel's* statements concerning my analysis is that it relies upon a "dissection of dissimilarities

4. Again, plaintiffs do not dispute that these are the phrases in issue in this case and that both of the two songs contain other music not at issue.

5. In my affidavit submitted in support of defendants' motion, I have not presented a full analysis of the similarities and differences between "Till You" and the Phantom Song as it is not relevant to this motion. That analysis is contained in my report, Exhibit 1 hereto, and will be tendered at trial, if necessary.

[which] is inappropriate" (Plaintiffs' Response, p. 17, n.13). I cannot fathom upon what this statement is based. My analysis relating to the derivation of Phrases One and Two of the Phantom Song focuses on my findings of *similarities* between Lloyd Webber's earlier works and those musical passages from the Phantom Song. In any event, there is nothing improper about conducting an accurate analysis comparing dissimilarities of compositions. Indeed, in contradiction of plaintiffs' counsel's position here, Prof. Wiley Hitchcock "dissects the dissimilarities" between "Till You" and Lloyd Webber's "Close Every Door", in an apparent effort to rebut defendants' counterclaim. Hitchcock Report, p. 23-33.

24. Plaintiffs' counsel's accusations (which mirror Prof. Hitchcock's conclusory contentions) that I have improperly "bean-counted" (Plaintiffs' Response at 44 n.32) or analyzed music out of context are rebutted by my discussion in ¶¶ 13-22, *supra*. None of plaintiffs' counsel's other statements concerning the alleged "flaws" in my analysis are supported in any way by Prof. Hitchcock's cursory statement in his affidavit. Indeed, plaintiffs' counsel's statements are *rebutted* by statements made and analyses conducted by Prof. Hitchcock in his report.

25. Plaintiffs' counsel's repeated accusation throughout his response that I wrongfully "bastardize", "alter", and "change" notes (Plaintiffs' Response at 43, 44, 47-49) is a misrepresentation to this Court. Notably, although plaintiffs try to insinuate otherwise, neither Profs. Mack nor Hitchcock have made *any* such accusation, as they know full well that such a representation by them would be wholly false. Plaintiffs' experts are aware that I have properly *transposed* the music and accurately presented the music transposed.

Appendix J

26. Moreover, Prof. Hitchcock fully concurs with my having transposed the relevant music of the various songs into one key. At pages 2-3 of his report, Prof. Hitchcock makes the following statement:

> "In order to compare the two pieces meaningfully, they both must be expressed in the same key; that is, at the same pitch level. In order to do this, the music of 'Phantom Song' must be expressed one whole tone (two semi-tones) higher than the published sheet music. I have made this *transposition* in the examples of music from 'Phantom Song' that are given and discussed below."

Hitchcock Report, pp. 2-3 (emphasis in original). Prof. Hitchcock reiterates that it is "helpful" to transpose compositions into the same key in order to compare them. Hitchcock Report, pp. 20, 34, 35.

27. Plaintiffs' counsel's litany of other alleged incorrect aspects of my music analysis (Plaintiffs' Response, p. 48) is a truly disingenuous attempt — *not* engaged in by plaintiffs' experts — to confuse this Court. Plaintiffs' counsel, who has no expert knowledge of the proper tools and methods for analyzing music, enumerates eight purported "flaws" in my analysis. Four of them relate to the issue of transposition or setting of music to the same pitch level, already discussed above at ¶¶ 25-26. Plaintiffs' contention that it is "radical reconstructive surgery" (Plaintiffs' Response, p. 48) to (a) "transpose [ ] the music into a different key"; (b) set [ ] music down one whole octave"; (c) "sets [ ] music up one octave and (d) transpose [ ] notes to the same pitch level" is contradicted by statements of plaintiffs' own expert who expressly *adopts* the transposition

of music and the setting of music "at the same pitch level". Hitchcock Report, p. 2.[6]

28. Another one of the alleged "flaws" in my analysis, depicted *only* by plaintiffs' counsel, is that "embellishing notes" should not be ignored or discounted in analytical comparisons of music. Prof. Hitchcock treats *the same embellishing notes at issue in "Till You"* as I do in my analysis; he discounts them as "being ornamental, merely decorative." Hitchcock Report, p. 32.

29. Plaintiffs' *lawyer's* other purported challenges to my method of analysis are similarly baseless and unsupported by an expert analysis. For example, as any music theorist knows, the repeated three "As" counted as one note in my analysis of the relevant passage from "Benjamin Calypso" (*see* Ferrara Aff. ¶ 35 n.5, Musical Ex. 10) should be counted as one note. The second two "As" do not introduce any new pitch and are heard only as repetitions of the first "A". Similarly, not counting as two notes a tied "Bb" note, which is only heard once, is virtually common sense. Plaintiffs' experts, again, do not anywhere support counsel's statement, because they cannot credibly do so.

30. Plaintiffs' counsel's statement that my audio taped piano examples of the relevant portions of the melodies of the Phantom Song and Lloyd Webber's earlier works, are

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6. Plaintiffs' counsel's equivocation that "changing the key may be relevant to some comparisons", "but not if dispositive significance is given to such a comparison merely of altered notes" (Plaintiffs' Response, p. 48, n.35) is an incomprehensible and unsuccessful "hedge" by plaintiffs' counsel to attempt somehow to remain consistent with his expert's statements but yet maintain his argumentative and baseless attack on my method.

"misleading and inaccurate" (Plaintiffs' Response p. 45) is again wholly unsupported by plaintiffs' experts, and it is false. Nor have I "boldly changed" the music. (Plaintiffs' Response, p. 45) If I had played the wrong notes or the melody incorrectly, I daresay Profs. Hitchcock or Mack would have so advised this Court.

31. Plaintiffs' counsel also misrepresents to this Court — once again without any expert support — that I have misrepresented the music in my musical examples, particularly the music of the five public domain pieces of works set forth on Musical Ex. 17 to the Ferrara Aff. *See* Plaintiffs' Response, p. 53 and Ex. 20 and 21.[7] First and foremost, neither Profs. Hitchcock nor Mack make any such accusation and therefore they clearly have conceded that my depiction of the music is accurate. Second, Prof. Hitchcock himself engages in both transposition, as discussed above, and the "short-hand" description of music — by melody with a chord symbol above it. Hitchcock Report p. 14. Plaintiffs' counsel's statements that my musical examples are inaccurate should be fully disregarded.

32. Notably, despite their attacks, plaintiffs are compelled to concede that there *are* melodic similarities between the referenced measures of these five songs and Phrase One of the Phantom Song. Plaintiffs Response, p. 56. To counter plaintiffs' effort to bury the relevant melodic phrases of these five public domain pieces (Plaintiffs' Ex. 33) and that I have altered the melody of the public domain works, in Audio Tape Ex. 3 hereto, I play, transposed into the same key, the melody of the five public domain works and Phrase One of the Phantom Song,

7. In fact, it is plaintiffs who have xeroxed an incomplete copy of the relevant portion of the actual sheet music of "None Can Tell" in Plaintiffs' Ex. 21.

without accompaniment (as I did in my first submission), followed by the full piano arrangements of each of the works. As that example demonstrates, the melodic pitches identified by me in the five public domain works are not "snippets" of the melody; they are the melodic pitches that constitute Phrase One.

33. As a final matter, both Prof. Hitchcock and plaintiffs' counsel claim the importance of "hearing" the music. Plaintiffs, however, who provide this Court with full soundtracks of the earlier Lloyd Webber songs, are seeking to bury the relevant melodic phrases in hundreds of notes and musical sections of Lloyd Webber's earlier songs which are not at issue. It is important to note that there is no claim by Lloyd Webber that the entirety of his earlier works are at issue. As Prof. Hitchcock has admitted, one must "isolate the portions in question." Hitchcock Report, p. 2.

34. In Audio Tape Ex. 4, I have excerpted from the commercially distributed soundtracks of the Phantom Song and "Benjamin Calypso" the music which I have identified as Phrase One. In Audio Tape Ex. 5, I have excerpted from the commercially distributed soundtracks of the Phantom Song and "Close Every Door" the music which I have identified as Phrase Two. To counter Prof. Hitchcock's conclusion that the melodic structures of "Till You" and "Close Every Door" are "fundamentally different", (Hitchcock Report p. 28) and to further demonstrate that Phrase Two of the Phantom Song is directly traceable to "Close Every Door", in Audio Tape Ex. 6 I play the melodies (as I did in my opening submission), followed by the full published piano arrangements, followed by excerpts from the commercially distributed soundtracks of "Till You" and "Close Every Door" which I have identified as Phrase Two.

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CONCLUSION

35. Plaintiffs have failed to offer any empirical musical analysis rebutting defendants' demonstration that the Phantom Song was independently created and derived from Lloyd Webber's earlier works which pre-date Repp's "Till You". Defendants' motion should be granted.

s/ Lawrence Ferrara
LAWRENCE FERRARA

Sworn to me before this 2nd day of November, 1993.

s/ Alessandra Milovic
NOTARY PUBLIC

Supreme Court, U.S.
FILED
JUN 22 1998
CLERK

No. 97-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANDREW LLOYD WEBBER; REALLY USEFUL GROUP, PLC; REALLY USEFUL COMPANY, INCORPORATED; MCA RECORDS, INC.; HAL LEONARD PUBLISHING CORPORATION; POLYGRAM RECORDS, INCORPORATED,

Petitioners,

v.

RAY REPP AND K & R MUSIC, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals appropriately determined that, in light of a genuine issue of material fact, summary judgment was inappropriate.

STATEMENT PURSUANT TO RULE 29.6

Respondents are Ray Repp, an individual, and K&R Music, Inc., a corporation. K&R Music, Inc. has no parent or subsidiary corporation.

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Petitioners,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 132 F.3d 882 (2d Cir. 1997). The opinion of the district court is reported at 858 F. Supp. 1292 (S.D.N.Y. 1994). Other opinions in the case are reported at: 947 F. Supp. 105 (S.D.N.Y. 1996); 914 F. Supp. 80 (S.D.N.Y. 1996); 892 F. Supp. 552 (S.D.N.Y. 1995); and 142 F.R.D. 398 (S.D.N.Y. 1992).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1997. A petition for rehearing and suggestion for rehearing en banc was denied on February 20, 1998. Pet. App. 48a. The petition for writ of certiorari was filed on May 20, 1998 and placed on the docket on May 21, 1998.

STATEMENT OF THE CASE

In this copyright action, respondents, songwriter Ray Repp and his publishing company, K & R Music, Inc., maintain that the "Phantom Song" in "The Phantom of the Opera" infringes respondent Repp's composition "Till You." Petitioners are the composer of the allegedly infringing song (Andrew Lloyd Webber), the publisher and copyright owner of the allegedly infringing song (Really Useful Group, Limited), and various licensees of rights in the allegedly infringing song.

The district court granted summary judgment to petitioners, but the court of appeals held that the evidence raised material factual issues and that the case should proceed to trial. A jury trial in the case is set to begin on November 2, 1998. App., *infra*, 1a.

A. The District Court

In the district court, petitioners moved for summary judgment, claiming that petitioner Lloyd Webber lacked access to, and had not copied, respondent Repp's "Till You" in composing the "Phantom Song." The district court granted petitioners' motion. Pet. App. 23a-47a.

The district court recognized the settled principle that, in certain cases, the similarities between the plaintiff's and defendant's work may be so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. Pet. App. 43a. The court

found, however, that respondents' proof in this case was inadequate to establish such "striking similarity." *Id.* at 44a.

In doing so, the district court recognized the propriety and admissibility of the expert musicological testimony submitted by respondents' distinguished experts. Pet. App. 44a.[1] But the district court refused to credit that testimony, instead substituting its own view. *Id.*

Professor Hitchcock concluded unequivocally that there is "no doubt about the striking similarity" of the two songs. Pet. App. 19a. He summarized: "the similarities are so many, in so many areas, over such an extraordinary proportion of the compositions, that I cannot consider them as insignificant or coincidental, and I must conclude that 'Phantom Song' is based on 'Till You.'" *Id.* at 9a-10a. Professor Mack also squarely concluded that "'Till You' and 'Phantom' are strikingly similar, and are so similar as to preclude separate creation." *Id.* at 10a.

Notwithstanding this evidence, the district court discerned no genuine issue of material fact regarding striking similarity. The district court stated that, based on its own "aural examination of the two songs and consideration of the expert testimony submitted by both parties, the Court finds that any similarities that exist between the two works are not so extensive as to support an inference of copying and improper appropriation without more." Pet. App. 44a. The district court gave no weight to respondents' separate evidence regarding petitioner Lloyd Webber's access to "Till

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[1] Respondents' experts are Professors H. Wiley Hitchcock and James Mack. Professor Hitchcock is Distinguished Professor of Music at the City University of New York and Founding Director of the Institute of Studies in American Music at Brooklyn College of City University; he is the author of a number of scholarly books and articles about music. Pet. App. 9a. Professor Mack is Professor and Chairman of the Humanities Department at Harold Washington College in Chicago, Illinois; he has composed music and has been employed as an arranger, conductor, and record producer. *Id.* at 10a.

You," including evidence of the song's wide public distribution. *Id.* at 38a-43a. Instead, it chose to credit the affidavits from petitioner Lloyd Webber and his former wife claiming his independent creation of the allegedly infringing song, and accorded no weight to respondents' evidence regarding petitioner Lloyd Webber's prior copying of songs. *Id.* at 44a-45a.[2]

B. The Court of Appeals

The court of appeals unanimously reversed the district court's grant of summary judgment to petitioners, and remanded for further proceedings. Pet. App. 1a-22a. On remand, the district court has set the case for jury trial starting on November 2, 1998. App., *infra*, 1a.

The court of appeals applied settled summary judgment principles. It "review[ed] the granting of a motion for summary judgment by applying the same standard as the district court applied and determin[ed] *de novo* whether or not summary judgment [was] warranted." Pet. App. 16a. The court of appeals emphasized that "it is necessary . . . to resolve all ambiguities and draw all inferences in favor of the non-moving party." *Id.* at 16a-17a. The court concluded that the district court had misapplied these principles:

> Clearly, the duty of a court on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved by trial and not to decide factual issues. In this regard, the court's task

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[2] Petitioners Lloyd Webber and Really Useful Group, Limited also filed a counterclaim, asserting that respondent Repp's "Till You" itself had been copied from petitioner Lloyd Webber's "Close Every Door." After a five-day trial on the counterclaim, the district court held in favor of respondent Repp. *Repp v. Webber*, 947 F. Supp. 105 (S.D.N.Y. 1996), *aff'd*, 132 F.3d 882 (2d Cir. 1997). The court credited respondent Repp's trial testimony, finding it supported by "the weight of credible evidence." 947 F. Supp. at 114-15; *see also* Pet. App. 14a, 22a.

> is issue identification, not issue resolution. . . . In performing this task, we must assume the truth of the non-movant's evidence. . . It seems to us that the district court failed to make the requisite assumption. We think that the district court undertook to resolve some material issues of fact revealed on the motion for summary judgment rather than to identify those issues and leave them for trial.

Id. at 17a-18a.

The court of appeals explained that the district court "recognized our rule permitting an inference of access where there is 'striking similarity.'" Pet. App. 19a. The court concluded, however, that "the district court fell into error in rejecting the evidence presented by the plaintiffs and making findings on this issue." *Id.* Pointing to respondents' evidence establishing striking similarity, the court of appeals held that "there was considerable evidence that 'Phantom Song' is so strikingly similar to 'Till You' as to preclude the possibility of independent creation and to allow access to be inferred without direct proof." *Id.*

Recognizing that the district court had relied on its own aural examination to reach a contrary conclusion, the court emphasized that "[i]t was not for the district court to make this factual finding where such strong competing evidence was before it." Pet. App. 19a. The court reiterated that "[a]ccess to the music of Repp [is] an essential element of his case," but determined that "it cannot be said that there is an absence of evidence to support proof of that element through the inference generated by the striking similarity of the two pieces." *Id.* at 19a-20a. As for the affidavits of petitioner Webber and his former wife, the court emphasized that it was for the fact-finder to consider that evidence in

light of other evidence, including respondents' evidence of striking similarity. *Id.* at 20a-21a.[3]

Petitioners requested rehearing and rehearing en banc concerning the court of appeals' reversal of summary judgment and remand for further proceedings. The court of appeals denied the petition, without dissent and with no judge requesting a vote on the suggestion for rehearing en banc. Pet. App. 48a-49a.

ARGUMENT

The petition raises no issue warranting this Court's review. The court of appeals held that the district court had misapplied settled summary judgment principles and had erroneously resolved factual issues at the summary judgment stage. The court thus remanded for further proceedings, and the case is set for trial on November 2, 1998. App., *infra*, 1a. The interlocutory character of the court of appeals' decision is itself a sufficient reason for denying the petition. *See e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Even aside from the interlocutory character, petitioners' claims do not warrant review. Petitioners repeatedly emphasize their view that the court of appeals' decision conflicts with prior Second Circuit precedent. Even if that characterization were accurate (which it is not), such an asserted intra-Circuit conflict would not warrant this Court's review. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (intra-Circuit issue should be resolved by the court of appeals; "[i]t is primarily the task of a Court of

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[3] The court of appeals separately affirmed the district court's trial judgment that respondent Repp had independently composed "Till You," and had not copied petitioner Lloyd Webber's 'Close Every Door.'" Pet. App. 21a-22a.

Appeals to reconcile its internal difficulties"). Petitioners' claim of an intra-Circuit conflict, in any event, is erroneous, as reflected by the court of appeals' unanimous decision and the lack of a single judge requesting a vote on the suggestion for rehearing en banc.

Petitioners likewise erroneously claim that the court of appeals' decision conflicts with decisions of other courts of appeals (some of which are unpublished). The court of appeals, of course, perceived no conflict with any other court. It noted that, depending on the context, evidence of striking similarity may give rise to an inference of access and copying. Pet. App. 16a. The court then merely determined that the district court had recognized this settled principle, had erroneously evaluated the particular evidence in this case, and had misapplied summary judgment principles. *Id.* at 19a.

Petitioners' asserted grounds for review are specious. *First*, petitioners claim that review is warranted because "The Court Below Has Eliminated Plaintiff's Burden Of Establishing Striking Similarity That Precludes The Possibility Of Independent Creation." Pet. 10. However, the court of appeals explicitly recognized and reiterated that an element of striking similarity is evidence of a character that precludes the possibility of independent creation: "'*If the works are so strikingly similar as to preclude the possibility of independent creation*, copying may be proved without a showing of access.'" Pet. App. 16a (quoting *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995)); emphasis added). Accordingly, petitioners' claim of a conflict — both within the Second Circuit and with other courts of appeals (Pet. 11) — is incorrect. Petitioners' real quarrel is with the court of appeals' evaluation of the

evidence at issue; but that evidentiary evaluation, which was correct, plainly does not warrant this Court's review.[4]

Petitioners likewise erroneously seek to rely on the court of appeals' reference to the affirmative defense of independent creation. Pet. 11. The court of appeals held that petitioners' proof of independent creation may be considered with all the evidence by the fact-finder. Pet. App. 21a. Thus, any claim by petitioners regarding the weight of the evidence can be decided in light of the fact-finding at trial, and does not present an issue meriting this Court's consideration.[5]

Second, petitioners claim that the court of appeals "eliminated" the plaintiff's burden regarding access when striking similarity is at issue, and that this purported holding conflicts with decisions of the Second Circuit and other

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[4] Almost all of the decisions petitioners cite from other courts of appeals include a holding that, unlike in this case, the evidence itself did not even rise to the level of presenting a colorable issue regarding "striking similarity." *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1067 (4th Cir. 1988); *Ferguson v. National Broad. Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978); *Trapani v. CBS Records, Inc.*, 857 F.2d 1475 (table), 1988 WL 92438, at *3 (6th Cir. 1988); *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984); *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 n.2 (11th Cir. 1986). This leaves only *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997), in which the court of appeals, like the court here, found evidence of striking similarity, squarely agreed with the Second Circuit's precedents on striking similarity, and determined that there is no split in the Circuits. *Id.* at 1170-72.

[5] Petitioners' attempt to invoke a treatise suggesting a conflict (Pet. i) likewise is inapposite. All of the circuit cases cited in the treatise concern evaluation of the evidence after trial, *see* 1 William F. Patry, *Copyright Law and Practice* 704 nn. 819-21 (1994), not, as here, a summary judgment decision precluding consideration of the evidence by the fact-finder. Moreover, in other contexts, courts of appeals have disagreed with treatises suggesting conflicts on "striking similarity" points, *see, e.g., Ty, Inc.*, 132 F.3d at 1170, and the court of appeals here perceived no conflict. Petitioners' reference to a "prior common source" (Pet. 14) likewise raises an evidentiary issue that can be addressed at trial.

courts of appeals. Pet. 17-18. However, the court recognized that access is "an essential element" of a plaintiff's case. Pet. App. 19a. Petitioners' claim of an intra-Circuit split, which would not be an adequate basis for review in any event, thus is erroneous.[6] Petitioners' claim of a conflict with decisions from the First, Fourth, and Ninth Circuits likewise is erroneous for the same reason. Those cases simply determined that, in the circumstances and on the evidence at issue there, an inference of access was not appropriate.[7] In this case, in marked contrast, even if petitioner Lloyd Webber and his wife's declarations are credited at face value, they merely show that petitioner Lloyd Webber does not consciously recall having been exposed to "Till You." *See* Pet. App. 50a-60a. However, that is not the point; unconscious copying is still impermissible copying. Pet. App. 16a.

The Fourth and Ninth Circuit decisions, moreover, are unpublished, and may not even be cited as precedent under Circuit rules (4th Cir. Local R. 36(c); 9th Cir. R. 36-3) — a factor that further undermines petitioners' claim for this Court's review.[8]

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[6] *See, e.g., Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) ("Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence"); *see also, e.g., Ty, Inc.* 132 F.3d at 1170 ("a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access").

[7] The evidence in these cases negated any reasonable possibility of access. *See Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 5-6 (1st Cir. 1996) (relying, in part, on computer-generated timesheets, which "could not be backdated," to conclude that there was no genuine issue of material fact regarding prior creation); *Takeall v. Pepsico, Inc.*, 14 F.3d 596 (table), 1993 WL 509876, at **4-5 (4th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Fodor v. Time Warner, Inc.*, 19 F.3d 27 (table), 1994 WL 65287, at **2 (9th Cir.), *cert. denied*, 513 U.S. 869 (1994). Notably, the Fourth Circuit's unpublished opinion explicitly agrees with Second Circuit precedent on striking similarity. *Takeall*, 1993 WL 509876, at **4-5 (citing *Gaste*, 863 F.2d at 1068).

[8] The court of appeals found that the evidence of striking similarity was an

Third, petitioners assert that "the court below has severely restricted the district court's discretion to grant summary judgment in copyright cases." Pet. 19. However, the court of appeals did not adopt some kind of per se rule that a district court may never consider the works at issue. The court merely held that, under settled summary judgment principles, "[i]t was not for the district court to make this factual finding where such strong competing evidence was before it." Pet. App. 19a. Once again, petitioners principally contend that the court of appeals' decision is inconsistent with the Second Circuit's own precedents. Once again, even if an intra-Circuit split presented a basis for this Court's review (which it does not), the suggestion of a conflict is erroneous. Like the panel decision here, the Second Circuit's precedents recognize that a comparison of works depends on an evaluation of the evidence in context.[9] The same is true of the two non-Second Circuit decisions and the copyright treatise cited by petitioners.[10] None of the cited decisions or authority remotely suggests that "strong competing evidence" (Pet. App. 19a) — which the court of

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adequate basis for reversal of the summary judgment. Notably, respondents also had argued — and continue to maintain — that other evidence also warranted proceeding to trial, including the wide dissemination of respondent Repp's song, the common genre of the songs, and petitioner Lloyd Webber's extensive prior copying. This evidence, which will be presented at trial, independently supports the judgment of the court of appeals reversing summary judgment, and further counsels against this Court's review of the court of appeals' interlocutory decision.

[9] *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140-41 (2d Cir. 1992); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765-66 (2d Cir. 1991); *see also* Pet. App. 15a & n.1 (citing and following *Laureyssens*).

[10] *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423-25 (9th Cir.), *cert. denied sub nom. Williams v. Baxter*, 484 U.S. 954 (1987); *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1096-98 (6th Cir. 1984). *See also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12.10[A], at 12-147 (1998) ("[T]he defendant should be denied summary judgment if on the issue of 'striking similarity' from which copying may be inferred without proof of access, there is a triable issue of fact.") (footnotes omitted).

appeals found in this case — should be rejected at the summary judgment stage.

Accordingly, petitioners present no issue warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 22, 1998

APPENDIX – SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DATED APRIL 15, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 906 (SWK)

RAY REPP and K & R MUSIC, INC.,

Plaintiffs,

- against -

ANDREW LLOYD WEBBER, THE REALLY USEFUL GROUP, PLC, THE REALLY USEFUL COMPANY, INC., MCA RECORDS, INC., HAL LEONARD PUBLISHING CORPORATION and POLYGRAM RECORDS, INC.,

Defendants.

SHIRLEY WOHL KRAM, U.S.D.J.

The Court having a scheduling conflict with certain criminal matters, it is hereby

ORDERED that the trial of this matter shall be adjourned to November 2, 1998 at 10:00 a.m.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
April 15, 1998